United States Court of Appeals for the Second Circuit



APPENDIX

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76-6102

United States Court of Appeals

FOR THE SECOND CIRCUIT

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON AND WARREN C. McDOWELL,

Plaintiffs-Appellants,

against

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L.J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center, GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS C. POL (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATON, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York, and the UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court For the Eastern District of New York

APPENDIX

SAM RESNICOFF and MURRAY A. GORDON, P.C. Attorneys for Plaintiffs-Appellants
Office & P. O. Address
666 Third Avenue
New York, N.Y. 10017
661-7900

Hon. David G. Trager
United States Attorney, Eastern
District of N.Y.
Attorney for Defendants-Appellees
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, N.Y. 11201

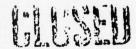
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PAGIMATION AS IN ORIGINAL COPY

INDEX

																PAGE
Docket Ent	ries		•				• •	•	• •	•	•	•	•	•	•	1a
Summons .		• •						•				٠	•	•	•	4a
Complaint								•		•		•	•	•	•	6a
	Sche Sche Sche	dule dule dule dule	nDn nCn nBn	ann ann	exed exed exed	to to	COM	pla pla pla	int int int	•	• •	•	•	•	•	32a 46a 59a 75a 90a
Answer .			•	•	• •		• •	•	• •	٠	• •	•	•	•	•	105a
Plaintiff: summary ju support the Defendant summary j	udgmer hereof	nt an	d af	fida	vit 	of · ·	WAR	REN	C.	MCD	975	LL.	or	n •		11 2a 120a
Defendant judgment pursuant Procedure	on the	e ple (c) c	eadir of th	ngs c	iism: edera	1881	ing	the	COL	ub T s	TUI	for t		•		122a
Memorandu appealed	um dec from	isio	n by	Cos	tant	ino	, J.	, a	nd •	jud	gme •	nt •				124a
Judgment						•	• •		•		•	•	•	• •		131a
Notice of	Appe	al.				•			•	• •	•	•	• •	•	• •	132a

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DATE	PLAINTIFF'S ACCOUNT	RECE	IVED	DISBU	RSED	DATE	DEFENDANT	"S ACCOUNT	RECEIVED	l D	ι
2-74	Complaint	15	00								
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HAJE et al - vs. - HAMPTON et al

FILINGS - PROCEEDINGS					
Complaint filed. Summons issued.	1	JS5			
Summons returned & filea./Exec a cd./	2				
By COSTANTINO, J Order dtd 5-30-74 extending time to answer					
complaint to 7=24=74 filed.	3				
Costantino, JOrder extending defts' time to answer to					
complaint to 8/2/74 filed.	4				
By COSTANTINO, J Order dtd. 8-7-74 extending time for defts					
to answer to 8-23-74 filed	_5				
ANSWER filed.	_6				
By COSTANTINO, J Order dtd 9-4-74 extending time to answer complaint to 8-29-74 filed.	7				
Notice of Motion, ret. 1/16/75 filed re: for summary judgment					
in favor of pltff's , etc.	8				
Memorandum in Support of Pltff's Motion forSummary Judgment					
filed.	9				
Before COSTANTIDO.J Case called - Pltff's motion for summary	·				
judgment adjd to 1/30/75 - Pre-trial conference adjd to	·				
1/30/75	•				
5 Before COSTANTINO, JCase called. Motion for summary	,				
judgment argued. Decision reserved. Pretrial adj'd w/out					
date.		_			
Notice of motion and memorandum of law for summary judgment in	- 193				
favor of defts, ret 2-20-75 at 10 A.M. filed.	10/11	_			
Before COSTANTINO, J Case called for hearing on deft's motio	h .	_			
for summary judgment. Motion argued and decision reserved.					
Memorandum in Opposition to Deft's motion for summary judgment	:	_			
filed. 6	12	_			
Motice of motion for judgment on the pleadings filed.	13	_			
Deft's memorandum in support of the motion filed.	14	_			
Before COSTANTINO, J Case called & adj'd to 6-6-75.		_			
By COSTANTINO, JOrder dtd 6-5-75 that the USA be made a	_	_			
deft to this action, that the claims of each of the pltff for	_	_			
back pay being in excess of 310,00 are reduced to 310,000 and		_			
pltffs' claims for an award for alleged tort damages are their					
dismissed with prejudice filed. (p/c mailed to attys)	. 15	_			
Before COSTANTINO, J Case called & motion for summary judg-		_			
	COPY	AVAILA			

CIVIL 74-C-458 HAJE et al -VS- HAMPTON et al

DATE	PROCEEDINGS		
2-76	By COSTANTINO, J Memo and order tdt. 6-1-	76 denying p	ltff's
	cross motion for judgment and granting def		
	summary judgment and directing the Clerk to	o enter	
	judgment filed.		
6-4-76	JUDGMENT dtd 6-4-76 granting defts motion f	or summary	iudement
	filed. p/c mailed to attys.		1
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SUMMONS IN A CIVIL ACTION

(Formerly D. C. Form No. 45 Nev. (6-49))

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO.____

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. McDOWELL,

Plaintiffs,

- against -

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L. J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center; GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS C. POL (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York,

74e. 458

SUMMONS

Defendants.

Medicockerot

To the above named Defendant :

You are hereby summoned and required to serve upon

SAMUEL RESNICOFF, Esq.,

plaintiff's 'attorney , whose address

280 Broadway New York, N.Y. 10007

(DIgby 9-3896)

Summons.

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Jewis Orgal Mary Willer Organ.

Date: Warel VV 1974.

[Seal of Court]

NOTE: -This summons is issued pursuant to Rule 1 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT + EASTERN DISTRICT OF NEW YORK

APNOID HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. McDOWELL,

Plaintiffs.

- against -

ROBERT E. HAMPTON, Chairman, JAYNE E. SPAIN and L. J. AMDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINDENT, Facility Chief, New York Center, GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS C. POL, (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York,

Defendants.

PRELIMINARY STATEMENT

- (1) Because of common questions of law and fact and to avoid a multiplicity of lawsuits, plaintiffs have joined in this action. All of the plaintiffs were formerly employed by defendant, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, John F. Kennedy International Airport, Jamaica, New York, and at the time of their dismissal occupied competitive civil service positions in the classified civil service.
- (2) All of the plaintiffs subsequent to their dismissal filed timely appeals with the REGIOMAL DIFECTOR, NEW YORK REGION, United States Civil Service Commission, and

7a

Complaint.

with the BOAPD OF APPEALS AND REVIEW, United States Civil Service Commission, Washington, D. C. Their administrative appeals having been denied, this action was instituted.

(3) This is a civil action to review, vacate and annul a determination made by the Board of Appeals and Review. United States Civil Service Commission, Washington, D. C., which affirmed the decision of the Regional Director, New York Region, which sustained the action of defendant Department of Transportation. Federal Aviation Administration, Eastern Region, Jamaica, New York, which dismissed all of the plaintiffs from their permanent civil service positions with said agency. In addition, this action seeks a declaratory judgment and a writ of mandamus directing defendants to reinstate plaintiffs to all of their quondam positions which they formerly held with said agency, together with back pay. Plaintiffs claim that the defendants herein, other than the individual defendants constituting the UNITED STATES CIVIL SEPVICE COMMISSION, by joint and concerted action, violated plaintiffs' rights to the equal protection and due process clauses of the Fifth and Fourteenth Amendments.

JURISDICTION

Jurisdiction is conferred upon this Court as follows:

- (a) Sections 1361 and 1391, Title 28, U.S.C.;
- (b) Section 1331, Title 28, U.S.C., in that the damages to each of the plaintiffs exceed \$10,000.00 and the matter arises under the United States Constitution, Laws and treaties;

- (c) Declaratory relief authorized by Title 28, U.S.C., Sections 2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure, and 42 U.S.C., Section 1983, which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all persons within the jurisdiction of the United States by the Constitution and laws of the United States;
- (d) The 14th Amendment to the Constitution of the U. S.;
- (e) 28 U.S.C., Section 1343 (3) (4), in that plaintiffs seek relief under 42 U.S.C., Sections 1951 and 1983, and that plaintiffs allege deprivation under color of state laws, of rights, privileges or immunities secured by the Constitution of the United States, or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States;
- (f) Section 702, Title 5, U.S.C., and Section 1985, Title 42, U.S.C.;
- (g) Section 7501, Title 5, U.S.C., and
- (h) Section 7701, Title 5, U.S.C.

BASIS FOR ACTION

(4) The Constitution of the United States specifically provides that no person shall be denied the equal protection of the laws. It also provides that no person shall be subjected to any discrimination in his civil rights and that no person shall be deprived of life, liberty or property without due process of law.

FOR A FIRST CAUSE OF ACTION IN FAVOR OF ARNOLD HAJE

(5) Plaintiff is an honorably discharged Navy veteran of the Korean War. He commenced employment with the Federal

Aviation Administration as an Air Traffic Control Specialist, &-7, on or about June 29, 1970. On January 10, 1971, he was promoted to Air Traffic Control Specialist, &-9.

- (6) As a CS-9, plaintiff's work performance was satisfactory. He was never charged with any dereliction; was never served with any written charges or specifications, and was never suspended from duty.
- POL the (Acting) Facility Chief of the Federal Aviation Administration, advised plaintiff that he proposed to remove him from his 65-9 position because of his "failure to satisfactorily complete upgrade training requirements for the position of "anual/Interphone Controller." This notice was improper since plaintiff satisfactor." performed all of the upgrade training requirements.
- (8) By letter dated May 12, 1972, defendant BILLIE H. VINCENT the Facility Chief of the FAA advised plaintiff of his dismissal effective May 19, 1972.
- (9) Plaintiff was not given an evidentiary hearing by the agency prior to his dismissal, and was then removed because of "Separation Inefficiency."
- (10) Plaintiff filed a timely appeal with the Regional Director, New York Region, United States Civil Service Commission. At the hearing before said Regional Director, plaintiff, by counsel, contended that his dismissal was illegal as a matter of

law because he was not given a full evidentiary hearing price to termination (KENNEDY v. SANCHEZ, 349 F. Supp. 863); that plaintiff's dismissal would not promote the efficiency of the service; that since it was conceded that plaintiff satisfactorily performed all of his duties as a 68-9, it was improper to dismiss him because he allegedly failed to pass a qualifying examination for promotion to CS-11: that plaintiff was being denied confrontation and cross-examination because requested agency witnesses were not made available (MILLIAMS v. ZUCKERT, 371 U.S. 531); that defendants failed and refused to make available to plaintiff bumping, retreat and reassignment rights; that the agency did not have the right to dismiss plaintiff a tenured employee from his competitive civil service position for the reason advanced; that as an honorably discharged veteran occupying a competitive civil service position in the classified civil service, plaintiff was protected against an illegal, improper and improvident removal, and that the Instructor who conducted the upgrade training and testing courses were not qualified to train and evaluate pursuant to standards established by the NATIONAL LAMFOUTE TRAINING PROGRAM.

- (11) On March 13, 1973, the Appeals Examiner on behalf of the Regional Director, New York Region, sustained the action of the agency.
- (12) Thereafter, plaintiff filed a timely appeal with the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. Annexed herewith and marked Schedule "A" is a copy of the Memorandum of Law submitted on behalf of plaintiff.

(13) On June 8, 1973, the Board of Appeals and Review,
U. S. Civil Service Commission, affirmed the decision of the
Regional Director, New York Region.

RELIEF REQUESTED

- (14) Since plaintiff was an honorably discharged veteran he was entitled to a full evidentiary hearing at the agency level prior to his dismissal. The failure, therefore, on the part of defendants to give plaintiff such a hearing prior to his dismissal, invalidated his removal (KENNEDY, et al. v. SANCHEZ, et al., 349 F. Supp. 863). Prior to the hearing before the Regional Director, New York Region, U. S. Civil Service Commission, plaintiff submitted the names of individuals employed by the agency to be produced as witnesses. The Appeals Examiner and the agency refused to make said employees available. The failure on the part of the Appeals Examiner to direct the agency to produce said employees who would have testified to matters of relevance and substance, and the failure of the agency to produce said individuals who were readily available and under its control, was contrary to WILLIAM v. ZUCKERT, 371 U.S. 531, and VITARELLI v. ·SFATON, 359 U.S. 535.
- (15) There was no statutory authority on the part of defendants to dismiss plaintiff from his GS-9 position because of inability to pass a qualifying promotional test for GS-11.

especially since it was conceded that petitioner satisfactorily performed all of his &=9 functions.

- unwarranted and an abuse of discretion by the agency (GADSEN v. U. S., 111 Ct. Cl. 487; CLARK v. U. S., 162 Ct. Cl. 477;

 DAUB v. U. S., 154 Ct. Cl. 434; CUIFFO v. U. S., 131 Ct. Cl. 60,

 137 F. Supp. 944, and SMITH v. MURPHY, 38 A.D. 2d 931, 330 N.Y.S.

 2d 146). Additionally, plaintiff's dismissal was not for such cause as would promote the efficiency of the service (CAPUTO v. RESCR. 360 F. 2d 770, Second Circuit).
- (17) Plaintiff should be reinstated to his quondam position of AIR TRAFFIC CONTROL SPECIALIST, GS-9 (\$11,046.00 per annum) retroactive to May 19, 1972, together with all other benefits, increments and differentials which were withheld.

FOR A SECOND CAUSE OF ACTION IN FAVOR OF THOMAS J. REVILACQUE

- (18) Plaintiff commenced employment with the FEDERAL AVIATION ADMINISTRATION as an Air Traffic Control Specialist, CS-7, on or about July 20, 1970. On January 24, 1971, he was promoted to Air Traffic Control Specialist, GS-9.
- (19) As a GS-9, plaintiff's work performance was satisfactory. We was never charged with any dereliction; was never served with any written charges or specifications, and was never suspended from duty.

- POL the (Acting) Facility Chief of the Federal Aviation Administration, advised plaintiff that he proposed to remove him from his CS-9 position because of his "failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller." This notice was improper since plaintiff satisfactorily performed all of the upgrade training requirements.
- (21) By letter dated April 28, 1972, defendant BILLIE

 H. VINCENT the Facility Chief of the FAA advised plaintiff of his
 dismissal effective May 5, 1972.
- (22) Plaintiff was not given an evidentiary hearing by the agency prior to his dismissal, and was then removed because of "Separation Inefficiency."
- Regional Director, New York Region, United States Civil Service Commission. At the hearing before said Regional Director, plaintiff, by counsel, contended that his dismissal was illegal as a matter of law because he was not given a full evidentiary hearing prior to termination (KENTEDY v. SANCUEZ, 349 F. Supp. 863); that plaintiff's dismissal would not premote the efficiency of the service; that since it was conceded that plaintiff satisfactorily performed all of his duties as a GS-9, it was improper to dismiss him because he allegadly failed to pass a qualifying examination for promotion to GS-11; that plaintiff was being denied confrontation and cross-examination because

requested agency witnesses were not made available (WILLIANS V. ZUCKERT, 371 U.S. 531); that defendants failed and refused to make available to plaintiff bumbing, retreat and reassignment rights; that the agency did not have the right to dismiss plaintiff a tenured employee from his competitive civil service position for the reason advanced, and that as a tenured employee occupying a competitive civil service position in the classified civil service, plaintiff was protected against an illegal, improper and improvident removal, and that the Instructor who conducted the upgrade training and testing courses were not qualified to train and evaluate pursuant to standards established by the NATIONAL ENROUTE TRAINING PROGRAM.

- (24) On February 15, 1973, the Appeals Examiner on behalf of the Regional Director, New York Region, sustained the action of the agency.
- (25) Thereafter, plaintiff filed a timely appeal with the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. Annexed herewith and marked Schedule "B" is a copy of the Memorandum of Law submitted on behalf of plaintiff.
- (26) On May 17, 1973, the Board of Appeals and Review.

 U. S. Civil Service Commission, affirmed the decision of the

 Regional Director, New York Region.

RELIEF PEQUESTED

- Since plaintiff was a tenured competitive civil (27) service employee occupying a competitive civil service position, he was entitled to a full evidentiary hearing at the agency level prior to his dismissal. The failure, therefore, on the part of defendants to give plaintiff such a hearing prior to his dismissal, invalidated his removal (KENTEDY, et al. v. SAICHEZ, et al., 349 F. Supp. 863). Prior to the hearing before the Regional Director, New York Region, U. S. Civil Service Commission, plaintiff submitted the names of individuals employed by the agency to be produced as witnesses. The Appeals Examiner and the agency refused to make said employees available. The failure on the part of the Appeals Examiner to direct the agency to produce said employees who would have testified to matters of relevance and substance, and the failure of the agency to produce said individuals who were readily available and under its control, was contrary to WILLIAMS v. ZUCKERT, 371 U.S. 531, and VITARELLI v. SEATON, 359 U.S. 535.
- (28) There was no statutory authority on the part of defendants to dismiss plaintiff from his &-9 position because of inability to pass a qualifying promotional test for &-11, especially since it was conceded that petitioner satisfactorily performed all of his &-9 functions.

- and an abuse of discretion by the agency (CADSEN v. U. S., 111 Ct. Cl. 487; CLAFK v. U. S., 162 Ct. Cl. 477; DAUB v. U. S., 154 Ct. Cl. 434; CUIFFO v. U. S., 131 Ct. Cl. 60, 137 F. Supp. 944, and SMITH v. MURPHY, 38 A.D. 2d 931, 330 N.Y.S. 2d 146). Additionally, plaintiff's dismissal was not for such cause as would promote the efficiency of the service (CAPUTO v. RESOR, 360 F. 2d 770, Second Circuit).
- (30) Plaintiff should be reinstated to his quondam position of AIR TRAFFIC CONTROL SPLCIALIST, 65-9 (\$11,046.00 per annum) retroactive to May 5, 1972, together with all other benefits, increments and differentials which were withheld.

FOR A THIRD CAUSE OF ACTION IN FAVOR OF LOUIS C. PESLER

- (31) Plaintiff is an honorably discharged veteran with more than twenty-three years of military service. He commenced employment with the FEDERAL AVIATION ADMINISTRATION as an Air Traffic Control Specialist, 68-7, on or about December 28, 1969. In January of 1971, he was promoted to AIR TRAFFIC CONTROL SPECIALIST, 68-9.
- (32) As a 65-9, plaintiff's work performance was satisfactory. He was never charged with any dereliction; was never served with any written charges or specifications, and was never suspended from duty.

- (33) By letter dated March 8, 1972, defendant LOUIS C.

 POL the (Acting) Facility Chief of the Federal Aviation Administration, advised plaintiff that he proposed to remove him from his ©-9 position because of his "failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller." This notice was improper since plaintiff satisfactorily performed all of the upgrade training requirements.
- (34) By letter dated April 19, 1972, defendant BILLIE

 H. VINCENT the Facility Chief of the FAA advised plaintiff of his
 dismissal effective April 28, 1972.
- (35) Plaintiff was not given an evidentiary hearing by the agency prior to his dismissal, and was then removed because of "Separation Inefficiency."
- Director, New York Region, United States Civil Service Commission.

 At the hearing before said Regional Director, plaintiff, by counsel, contended that his dismissal was illegal as a matter of law because he was not given a full evidentiary hearing prior to termination (KLNTEDY v. SANCYTZ, 349 F. Supp. 863); that plaintiff's dismissal would not promote the efficiency of the service; that since it was conceded that plaintiff satisfactorily performed all of his duties as a CS-9, it was improper to dismiss him because he allegedly failed to pass a qualifying examination for promotion to CS-11; that plaintiff was being denied confrontation and cross-examination because requested agency witnesses were not made available (WILLIALS v. ZUCKERI, 371 U.S. 531); that defendants failed and refused to make available to plaintiff bumping, retreat

and reassignment rights; that the agency did not have the right to dismiss plaintiff a tenured employee from his competitive civil service position for the reason advanced, and that as an honorably discharged veteran occupying a competitive civil service position in the classified civil service, plaintiff was protected against an illegal, improper and improvident removal, and that the Instructors who conducted the upgrade training and testing courses were not qualified to train and evaluate pursuant to standards established by the NATIONAL ENROUTE TRAINING PROGRAM.

- (37) On May 22, 1973, the Appeals Examiner on behalf of the Regional Director, New York Region, sustained the action of the agency.
- (38) Thereafter, plaintiff filed a timely appeal with the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. Annexed herewith and marked Schedule "C" is a copy of the Memorandum of Law submitted on behalf of plaintiff.
- (39) On August 20, 1973, the Board of Appeals and Review, U. S. Civil Service Commission, affirmed the decision of the Regional Director, New York Region.

RELIEF REQUESTED

(40) Since plaintiff was an honorably discharged veteran, he was entitled to a full evidentiary hearing at the agency level prior to his dismissal. The failure, therefore, on the part of defendants to give plaintiff such a hearing prior to his dismissal, invalidated his removal (KENDMEDY, et al. v. SANCHEZ,

et al., 349 F. Supp. 863). Prior to the hearing before the Regional Director, New York Region, U. S. Civil Service Commission, plaintiff submitted the names of individuals employed by the agency to be produced as witnesses. The Appeals Examiner and the agency refused to make said employees available. The failure on the part of the Appeals Examiner to direct the agency to produce said employees who would have testified to matters of relevance and substance, and the failure of the agency to produce said individuals who were readily available and under its control was contrary to WILLIAMS v. ZUCKEET, 371 U.S. 531, and VITAFELLI v. SEATON, 359 U.S. 535.

- (41) There was no stautory authority on the part of defendants to dismiss plaintiff from his &-9 position because of inability to pass a qualifying promotional test for GS-11, especially since it was conceded that petitioner satisfactorily performed all of his GS-9 functions.
- (42) Plaintiff's dismissal was unduly harsh, unwarranted and an abuse of discretion by the agency (GADSEN v. U. S., 111 Ct. Cl. 487; CLAPK v. U. S., 162 Ct. Cl. 477; DAUB v. U. S., 154 Ct. Cl. 434; CUIFFO v. U. S., 131 Ct. Cl. 60, 137 F. Supp. 944, and SMITH v. MUDDAY, 38 A.D. 2d 931, 330 N.Y.S. 2d 146). Additionally, plaintiff's dismissal was not for such cause as would promote the efficiency of the service (CAPUTO v. RESOR, 360 F. 2d 770, Second Circuit).

(43) Plaintiff should be reinstated to his quondam position of AIR TRAFFIC CONTROL SPECIALIST, 65-9 (\$11,046.00 per annum) retroactive to April 28, 1972, together with all other benefits, increments and differentials which were withheld.

FOR A FOURTH CAUSE OF ACTION IN FAVOR OF JOHN J. STAMMON

- (44) Plaintiff is an honorably discharged veteran of World War II and the Korean War. He commenced employment with the FEDERAL AVIATION ADMINISTRATION as an AIR TRAFFIC CONTROL SPECIALIST, GS-7, on June 29, 1970. On February 7, 1971, he was promoted to AIR TRAFFIC CONTROL SPECIALIST, GS-9.
 - (45) As a GS-9, plaintiff's work performance was satisfactory. He was never charged with any dereliction; was never served with any written charges or specifications, and was never suspended from duty.
 - (46) By letter dated March 8, 1972, defendant LOUIS C.

 POL the (Acting) Facility Chief of the Federal Aviation Administration, advised plaintiff that he proposed to remove him from his CS-9 position because of his "failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller." This notice was improper since plaintiff satisfactorily performed all of the upgrade training requirements.
 - (47) By letter dated April 19, 1972, defendant BILLIE H. VINCENT the Facility Chief of the FAA advised plaintiff of his dismissal effective April 28, 1972, which was thereafter extended to May 5, 1972.

- (48) Plaintiff was not given an evidentiary hearing by the agency prior to his dismissal, and was then removed because of "Separation Inefficiency."
- (49) Plaintiff filed a timely appeal with the Regional Director. New York Region. United States Civil Service Commission. At the hearing before said Regional Director, plaintiff, by counsel, contended that his dismissal was illegal as a matter of law because he was not given a full evidentiary hearing prior to termination (KENTEDY v. SANCYEZ, 349 F. Supp. 863); that plaintiff's dismissal would not promote the efficiency of the service; that since it was conceded that plaintiff satisfactorily performed all of his duties as a 65-9, it was irorcper to dismiss him because he allegedly failed to pass a qualifying examination for promotion to GS-11: that plaintiff was being denied confrontation and cross-examination because requested agency witnesses were not made available (ILLIATO v. TUCKETT, 371 U.S. 531); that defendants failed and refused to make available to plaintiff bumping, retreat and reassignment rights; that the agency did not have the right to dismiss plaintiff a tenured employee from his competitive civil service position for the reason advanced, and that as an honorably discharged veteran occupying a competitive civil service position in the classified civil service, plaintiff was protected against an illegal, improper and improvident removal, and that the Instructors who conducted the upgrade training and testing courses were not qualified to train and evaluate pursuant to standards established by the NATIONAL EMPOUTE TRAINING PROGRAM.

- (50) On May 7, 1973, the Appeals Examiner on behalf of the Regional Director, New York Region, sustained the action of the agency.
- (51) Thereafter, plaintiff filed a timely appeal with the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. Annexed herewith and marked Schedule "D" is a copy of the Memorandum of Law submitted on behalf of plaintiff.
- (52) On 21, 1973, the Eoard of Appeals and Peview, U. S. Civil Service Commission, affirmed the decision of the Degional Director, New York Region.

RELIF PEQUESTED

veteran, he was entitled to a full evidentiary hearing at the agency level prior to his dismissal. The failure, therefore, on the part of defendants to give plaintiff such a hearing prior to his dismissal, invalidated his removal (KFINTDY, et al. v. SACCIEZ, et al., 349 F. Supp. 263). Prior to the hearing before the Regional Director, New York Region, U. S. Civil Service Commission, plaintiff submitted the names of individuals employed by the agency to be produced as witnesses. The Appeals Examiner and the agency refused to make said employees available. The failure on the part of the Appeals Examiner to direct the agency to produce said employees who would have testified to matters of relevance and substance, and the failure of the agency to produce

was contrary to <u>WILLIAMS v. ZUCKERT</u>, 371 U.S. 531, and <u>WITAPLLIT v.</u>
<u>SEATON</u>, 359 U.S. 535.

- (54) There was no statutory authority on the part of defendants to dismiss plaintiff from his GS-9 position because of inability to pass a qualifying promotional test for GS-11, especially since it was conceded that petitioner satisfactorily performed all of his GS-9 functions.
- unwarranted and an abuse of discretion by the agency (CADSEM v. U. S., 111 Ct. Cl. 487; CLAPK v. U. S., 162 Ct. Cl. 477; DAUB v. U. S., 154 Ct. Cl. 434; CUJFFO v. U. S., 131 Ct. Cl. 60, 137 F. Supp. 944, and SMITH v. NUPPLY, 38 A.D. 2d 931, 330 N.Y.S. 2d 146). Additionally, plaintiff's dismissal was not for such cause as would promote the efficiency of the service (CAPUTO v. PESOR, 360 F. 2d 770, Second Circuit).
- (56) Plaintiff should be reinstated to his quondam position of AIR TRAFFIC CONTROL SPECIALIST, GS-9 (S11,414.00 per annum) retreactive to May 5, 1972, together with all other benefits, increments and differentials which were withheld.

FOR A FIFTH CAUSE OF ACTION IN FAVOR OF WARREN C. McDOWELL

(57) Plaintiff is an honorably discharged Vietnam
War veteran. He commenced employment with the FEDEFAL AVIATION

ADMINISTRATION as an AIR TRAFFIC CONTROL SPECIALIST, © -6, on or about October 28, 1968. On December 15, 1968, he was promoted to AIR TRAFFIC CONTROL SPECIALIST, © -7. On May 4, 1969, plaintiff was promoted to a GS-9 position. On October 18, 1970, he was promoted to AIR TRAFFIC CONTROL SPECIALIST, © -11.

- (58) As a GS-11, plaintiff's work performance was satisfactory. He was never charged with any dereliction; was never served with any written charges or specifications, and was never suspended from duty.
- (59) By letter dated August 2, 1972, defendant BILLIE
 H. VINCENT, Facility Chief of the Federal Aviation Administration,
 advised plaintiff that he proposed to remove him from his CS-11
 position because of his "failure to satisfactorily complete
 upgrade training requirements for the position of Radar Controller/
 Limited Developmental." This notice was improper since plaintiff
 satisfactorily performed all of the upgrade training requirements.
- (60) By letter dated September 20, 1972, said defendant billie H. VI'KENT the Facility Chief of the FAA advised plaintiff of his dismissal effective September 22, 1972.
- (61) Plaintiff was not given an evidentiary hearing by the agency prior to his dismissal, and was then removed because of "Separation Inefficiency."
- (62) Plaintiff filed a timely appeal with the Regional Director, New York Region, United States Civil Service Commission.

At the hearing before before said Regional Director, plaintiff, by counsel, contended that his dismissal was illegal as a matter of law because he was not given a full evidentiary hearing prior to termination (KENNEDY v. SA'CMEZ, 349 F. Supp. 863); that plaintiff's dismissal would not promote the efficiency of the service; that since it was conceded that plaintiff satisfactorily performed all of his duties as a GS-11, it was improper to dismiss him because he allegedly failed to pass a qualifying examination for promotion to GS-12; that plaintiff was being denied confrontation and cross-examination because requested agency witnesses were not made available (WILLIAM'S v. BUCKERT, 371 U.S. 531); that defendants failed and refused to make available to plaintiff bumping, retreat and reassignment rights; that the agency did not have the right to dismiss plaintiff a tenured employee from his competitive civil service position for the reason advanced, and that as an honorably discharged veteran occupying a competitive civil service position in the classified civil service, plaintiff was protected against an illegal, improper and improvident removal, and that the Instructors who conducted the upgrade training and testing courses were not qualified to train and evaluate pursuant to standards established by the NATIO WL ENHOUSE TRAINING PROGRAM.

(63) A hearing was held before the Regional Director,
New York Region, on February 7, 1973, at which time the hearing
was closed and decision was reserved. Thereafter, at the request
of the agency and over objection, the Appeals Examiner reopened
the hearing on March 1, 1973 and permitted the agency to introduce
additional evidence which was available and which it had in its
possession on February 7, 1973.

- (64) On May 1, 1973, the Appeals Examiner on behalf of the Regional Director, New York Region, sustained the action of the agency.
- (65) Thereafter, plaintiff filed a timely appeal with the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. Annexed herewith and marked Schedule "E" is a copy of the Memorandum of Law submitted on behalf of plaintiff.
- (66) On August 14, 1973, the Board of Appeals and Review, U. S. Civil Service Commission, affirmed the decision of the Regional Director, New York Region.

RELIEF REQUESTED

- veteran, he was entitled to a full evidentiary hearing at the agency level prior to his dismissal. The failure, therefore, on the part of defendants to give plaintiff such a hearing prior to his dismissal, invalidated his removal (KEMMEDY, et al. v. SAMCHEZ, et al., 349 F. Supp. 863). At the hearing before the Regional Director, the agency over objection failed and refused to produce as witnesses the so-called Instructors who conducted the upgrade training and testing courses. This, therefore, denied to plaintiff his constitutional right to procedural due process and deprived plaintiff of his right of cross-examination and confrontation.
 - (68) There was no statutory authority on the part of defendants to dismiss plaintiff from his &-11 position because of inability to pass a qualifying promotional test for GS-12,

especially since it was conceded that plaintiff satisfactorily performed all of his GS-11 functions.

- unwarranted and an abuse of discretion by the agency (GADSEN v. U. S. 111 Ct. Cl. 487; CLAFK v. U. S., 162 Ct. Cl. 477; DAUB v. U. S., 154 Ct. Cl. 434; CUIFFO v. U. S., 131 Ct. Cl. 60, 137 F. Supp. 944, and STITH v. PURPLY, 38 A.D. 2d 931, 330 N.Y.S. 2d 146). Additionally, plaintiff's dismissal was not for such cause as would promote the efficiency of the service (CAPUTO v. RESOR, 360 F. 2d 770, Second Circuit).
- (70) Plaintiff should be reinstated to his quondam position of AIR TRAFFIC CONTROL SPECIALIST, GS-11 (\$13,309.00 per annum), retroactive to September 22, 1972, together with all other benefits, increments and differentials which were withheld.

BASIS FOR PELIEF

- (71) This Court has jurisdiction over the subject matter. All of the plaintiffs are tenured Federal civilian employees. The agency is a Federal agency and located within the Judicial District and the cause of action arose therein (Section 1391 (e), Title 28, U.S.C.).
- (72) Pursuant to Section 1361, Title 28, U.S.C., this Court has original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiffs.

- (73) A declaratory judgment is authorized by Sections 2201 and 2202, Title 28, U.S.C., and Rule 57 of the Rules and Procedure.
- (74) Plaintiffs are in a position to invoke Sections 1981, 1983 and 1985 of Title 42, U.S.C.
- (75) Pursuant to Section 702, Title 5, U.S.C., a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.
- (76) No previous application for the relief sought herein has been made to this or any other Court.
- (77) No adequate remedy at law is available to plaintiffs.
- (73) Plaintiffs have exhausted all administrative remedies (PAY v. U. S., 144 Ct. Cl. 188).

WHEREFORE, plaintiffs respectfully pray that this Court:

(a) Enter a declaratory judgment against all defendants declaring that the action of defendants in terminating plaintiffs' employment to be in violation of the Constitution of the United States, in that it denies to plaintiffs procedural due process and the equal protection of the laws;

- (b) Vacate, annul and set aside the determinations made by defendants which dismissed plaintiffs from their positions with the DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, New York;
- (c) Issue a writ of mandamus directing defendants to reinstate plaintiff ADMOLD HAJE to his quondam position of AIR TRAFFIC CONTROL SPECIALIST, GS-9, (\$11,045.00 per annum), together with back pay, retroactive to May 19, 1972, etc.;
- (d) Issue a writ of mandamus directing defendants to reinstate plaintiff TECHAS BEVILACQUE to his quondam position of AIR TEAFFIC CONTROL SPECIALIST. CS-9 (S11,C46.CO per annum), together with back pay, retroactive to May 5, 1972, etc.;
- (e) Issue a writ of mandamus directing defendants to reinstate plaintiff LOUIS C. RESILER to his quondam position of AIR TRAFFIC CONTROL SPECIALIST, &-9 (\$11,046.00 per annum), together with back pay, retroactive to April 28, 1972, etc.;
- (f) Issue a writ of mandamus directing defendants to reinstate plaintiff JOHN J. SHANNON to his quondam position of AIR TRAFFIC CONTROL SPECIALIST. ©S-9 (\$11,414.00 per annum), together with back pay, retroactive to May 5, 1972, etc.;

- (g) Issue a writ of mandamus directing defendants to reinstate plaintiff WAFREN C. McDOWELL to his quondam position of AIR TRAFFIC CONTROL SPECIALIST, 65-11 (\$13,309.00 per annum), together with back pay, retroactive to September 22, 1972, etc.;
- (h) Set the case down for trial, should the Court in its discretion determine that further oral testimony is necessary;
- (i) Award damages in the sum of \$100,000.00 against those defendants who conspired and did deprive plaintiffs of their constitutional and civil rights;
- (j) That this Court retain jurisdiction of this action until such time as defendants comply with the provisions of the Fourteenth Amendment and the statutes enumerated above, and

(k) That this Court grant such other and further relief as may be proper.

DATED: New York, January 14, 1974.

Respectfully submitted,

Attorney for Plaintiffs Office & P. O. Address 280 Broadway New York, N.Y. 10007

DIgby 9-3896

Schedule "A", Annexed to Complaint.

BOARD OF APPLAIN AND REVIEW UNITED STATES GIVEN SERVICE COMMISSION WASHINGTON, D. C., 20415

In the Matter of the Appeal of ARMOLD HAJE,

Appellant.

PRELIMINARY STATE EMT

Appellant, an honorably discharged Navy veteran of the Korean War, and a tenured competitive civil service employee, occupying a position in the classified civil service, appeals from a determination dated March 13, 1973, by Appeals Examiner BERT GAMEER for the Regional Director, New York Region, sustaining the action of the New York Federal Aviation Administration, which removed appellant from his position of AIR TEAFFIC COMTROL EPECIALIST, GL-9, Step 1, effective May 19, 1972. The appeal before the Regional Director came on before Appeals Examiner JOLEPH LIVINGSTON on February 23, 1973.

There was no hearing at the agency level <u>prior</u> to termination. Appellant was dismissed as of 19 May 1972. The "hearing" which was accorded appellant on August 29, 1972 at the agency, subsequent to his dismissal was marely

an exercise in futility. It was not an oral reply as contemplated by 5 C.F.R. par. 752.202 (b), WASHINGTON v. U. S., 137 Ct. Cls. 344, and CAMERO v. U. S., 179 Ct. Cls. 192.

THE FACTS

Appellant commenced employment with FAA as an Air Traffic Control Specialist, GS-7, on or about June 29, 1970 (p. 32). Upon completion of his probationary period, he was promoted to Air Traffic Control Specialist, GS-9, on January 10, 1971 (p. 33). It was conceded that as a GS-9, appellant's work performance was satisfactory (p. 74).

By letter dated 9 March 1972, the (Acting) Facility Chief advised appellant that he proposed to remove him from his position, etc., because of his "failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller." By letter dated 12 May 1972, the Facility Chief informed appellant of his dismissal effective 19 May 1972.

THE ISSUES

There are a number of issues in lived in this matter. Primarily, they may be divided in two categories:

- legal and consistent with decisional law?

 If the agency violated appellant's procedural rights, then its action was clearly illegal, in that it denied to appellant procedural due process and the equal protection of the laws. In connection therewith, should the BOARD OF APPEALS AND REVIEW sustain this contention, then, of course, it would be unnecessary to consider and review the other objections being raised herein.
- 2) Without waiving the efficacy of our contention that everything done by the agency was illegal as a matter of law, appellant further contends that the action of the agency in summarily separating him was in excess of its statutory authority, jurisdiction and limitations; and that his removal was discriminatory, arbitrary, capricious and unreasonable.

These contentions will be discussed seriatim.

POINT I.

THE ACTION OF THE AGENCY IN SUMMARILY TERMINATING APPELLANT WITHOUT GIVING HIM A HEARING PRIOR TO TERMINATION, WAS ILLEGAL, IMPROPER AND CONTRARY TO DECISIONAL LAW.

It is basic, fundamental and axiomatic that the Courts will not sanction an administrative action which denied the employee an opportunity of being heard before the drastic penalty of dismissal was imposed.

Appellant's right to continue employment could not be constitutionally withheld. He had more than a mere subjective "expectancy". He enjoyed "a property interest in continued employment" (PERRY v. SINDERVAN, 408 U.S. 593, and BOARD OF REGENTS v. ROTH, 408 U.S. 564, decided June 29, 1972).

Appellant, a veteran, was a career employee occupying a competitive civil service position. As a tenured employee, he could not be removed without a hearing. In the cases of PERRY v. SINDERMAN and BOAFD OF REGENTS v. ROTH, supra, the Supreme Court held that employment was a "property right" which could not be summarily dissipated without a hearing. In KENNEDY v. SANCHEZ, decided October 24, 1972, by a three-Judge Statutory Court in the Northern District of Illinois, Judge McIAREN writing unanimously for

the Court, held that any rule, regulation or statute which terminated the employment of a non-probationary Federal employee in the competitive civil service without a full evidentiary hearing prior to termination was a violation of the Fifth Amendment of the United States Constitution.

In FITZGERAID v. HAPTON. 329 F. Supp. 997, the Court also held that a Federal civilian employee was entitled to a hearing.

The above decisions are binding on the BOARD OF APPEALS AND REVIEW. The decisions by the SUPREME COURT OF THE UNITED STATES in ROTH and SINDERMAN, supra, are final. There is no further avenue of appeal from said decisions. Since the decisions in KENFEDY v. SANCHEZ and FITZGERALD v. HAMPTON were not stayed, they must be followed by this BOARD.

As a veteran and a permanent employee, appellant acquired tenure and a property right to his position which included continuity of employment. The right to continuity of employment was and is a constitutionally protected property right. In GOLDBERG v. KELLY, 397 U.S. 254, the Supreme Court of the United States held that the "rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scrutiny."

In the notice of proposed removal dated 9 March 1972, the (Acting) Facility Chief stated "This is notice that I propose to remove you from your position as Air Traffic Control Specialist (Center) GS-2152-9 ***. On the third page of said notice, the statement also appeared "Full consideration will be given to any reply you submit." There was nothing to indicate in said notice that the penalty would be a demotion in grade, suspension, or a reprimand.

It is our contention that the agency in its charging letter decided to dismiss appellant even before any reply was submitted by him. The action of the agency in permitting appellant an opportunity to submit his reply was merely a token compliance with the statute and was merely a form preceding a predetermined removal. The agency has adopted a "policy" of dismissing all of its tenured employees who could not pass the qualifications for promotion.

The precise situation herein arose in the case of NORMAN FINKELSTEIN who was employed as a Motion Picture Film Cleaning Machine Operator, WE-3, ARMY PICTORIAL CENTER. On February 14, 1962, he was served with a letter of charges which advised him that "it is proposed to effect your removal effective March 20, 1962, for lack of dependability:

***.* Mr. FINKELSTEIN was dismissed. An appeal was filed

38a Schedule "A". with the Regional Director, Second U. S. Civil Service Region. A hearing was held on June 6, 1962. On July 10, 1962, the Regional Director sustained the dismissal. An appeal was taken to the BOARD OF APPEALS AND REVIEW. By letter dated October 11, 1962, the BOAFD OF APPEALS AND REVIEW in annulling the dismissal, held: *The net effect was that the employee was denied any advance notice before the decision was made and was foreclosed of any effective action on his part to escape the removal action. This was fatal procedural error." Pursuant to the decision of the BOARD OF APPEALS AND REVIEW, Mr. FINKEISTEIN was reinstated. The action of the agency in failing to give appellant herein a full evidentiary hearing prior to termination deprived him of his constitutional rights to procedural due process and the equal protection of the laws. Under the circumstances, corrective action must be taken and an order should issue directing appellant's reinstatement.

POINT II.

THE ACTION OF THE AGENCY IN TERMINATING APPELLANT BESIDES BLING ILLEGAL AND IMPROPER. WAS IN EXCESS OF ITS STATUTORY AUTHORITY. JURISDICTION AND LIMITATIONS, AND WAS ARBITRARY, CAPRICIOUS, DISCRIMINATORY AND UNREASONABLE.

It is conceded that every government agency has the right to promulgate rules and regulations. However, the rules so established may not contravene basic statutes. This is particularly true in the area of separation and removal where uniformity, equality, certainty and security are so essential if civil service efficiency and morale are to be maintained. The Civil Service provisions are intended as a protection for all employees in the civil service. The purpose of civil service is to protect the diligent, conscientious and competent employee. All of the statutes, rules and regulations pertaining to civil service are an attempt by Congress to hold agencies and heads of departments to a standard of social justice in their dealings with competitive civil service employees. The statutes, etc., are to be interpreted with a degree of liberality essential to the attainment of that end in view. This principle is imbedded in public policy and may not be uprooted by any scheme or plan or even a well-intentioned denial.

Appellant is of course entitled to challenge the

dismissal determination as based upon errors of law and as lacking supporting substantial evidence. Such a challenge entails a judicial review of the administrative decision to determine whether it was based upon substantial evidence and free from errors of law, fraud, bad faith and arbitrary action (UNITED STATES v. CAPLO BIANCHI & CO., 373 U.S. 709, and KOPPERS CO. v. U.S., 186 Ct. Cl. 142, 405 F. 2d 554).

Appellant was promoted to the GS-9 position on January 10, 1971 (p. 33). According to Mr. DeLUCA the agency representative, appellant was directed to report to Oklahoma City on August 31, 1971. Appellant had been in grade as a 9 for less than one year and was still on probation. Appellant did not request to go to school (pp. 15, 33). On direct examination of Mr. DeLUCA, the following testimony was adduced (p. 15):

- "Q. Now, did he ask to go to Oklahoma City?
- A. He never asked me to go to Oklahoma City, no sir."

In this connection, appellant testified (p. 33):

- *Q. Did you request to go to this school?
- A. No sir, I did not."

The record is barren of any evidence to justify
the selection of candidates "picked" for school. Since no
rational reason was offered to explain or to justify the

41a Schedule "A". selection, i.e., longevity in grade or competency to proceed with progression, it obviously follows that the selections were arbitrary, capricious and unreasonable. The following testimony was also elicited from Mr. DeLUCA (pp. 16-17): He was directed to go to school? Yes sir. A. And he had no choice in the matter Q. is that correct? What do you mean by choice in the matter? He had to go, he was selected by who? Q. He was selected by the Evaluation Proficiency A. Development Officer as Who is that Lowell? Q. Mr. Lowell, right. A. And he was directed to go? Q. He was assigned to participate, yes sir. A. Since appellant had been in grade as a 9 only several months, the action of the official in designating him to go to school without even a discussion with his Team Supervisor as to appellant's fitness at that time, clearly betokens the arbitrary and irrational manner in which the official made th designation. - 10 -

At the hearing before the Regional Director, appellant was denied his fundamental right of confrontation and cross-examination. It was incumbent upon the agency to produce the Radar Controllers who acted as Instructors and make them available for cross-examination. The four Radar Controllers who evaluated appellant were Messrs. AMMEN, STOFFE, CARUSO and GRELISH (p. 19). At the hearing before the Regional Director (pp. 23-24), it was stipulated that with the exception of AMMEN, the other three Radar Controllers "did not go to a formalized instructor training course," and that AMEN went to the regional school and not to the F.A.A. Academy in Oklahoma City. The stipulation also provided "that all of these men were selected as instructors by Mr. Lowell* (p. 24). Appellant challenged the qualifications and expertise of the four Radar Controllers who were chosen to act as Instructors. These so-called Instructors were never made available by the agency for cross-examination. Neither were they produced at the "hearing" on August 29. 1972 at the agency level.

Upon what basis did Mr. LOWELL select the four Radar Controllers to act as Instructors? What special knowledge or expertise did they possess which qualified them to teach, examine and evaluate? Were they acting out-of-title? Were they in fact qualified? Appellant had the right to

explore those issues. Appellant testified that the answers which he gave were just as good as the answers of the Radar Controllers who were appointed to or detailed as Instructors (p. 46).

The failure therefore, on the part of the agency to produce the Radar Controllers at the hearing and make them available for cross-examination, denied to appellant procedural due process and the equal protection of the laws. Neither appellant nor his representative could cross-examine a report.

One observation is quite pertinent. In its haste to advance Air Traffic Control Specialists to \$\omega\$-12 and \$\omega\$-13 positions, the agency will within the immediate future have an overabundance and a surplus of personnel in these high-ranking positions. They will be overstacked like planes backing up in zero visibility. Not only will the 12's and 13's be performing the functions of 9's and 11's (which already is happening - p. 75), but a reduction-in-force will inevitably result. The handwriting is on the wall and unless this unfair, illegal and inequitable policy is corrected, the Commission in the not-too-distant future will be confronted with a plethora of "riff" appeals.

In his decision (p. 5) Appeals Examiner BERT GANZER (who did not conduct the hearing) stated:

"*** The lives and safety of the flying public are in the hands of Air Traffic Controllers."

Appellant does not dispute that statement. However, it is prejudicial insofar as appellant is concerned. There is no charge (and there never was a charge) that appellant herein did not satisfactorily perform his functions and duties as a GRADE 9. The charge herein (which is seriously challenged by appellant) is that appellant failed to pass problems which would have made him eligible for promotion to Grade 11. Appellant neither filed for nor sought promotion to Grade 11. He had no choice. According to the policy of the agency it was "do or die." There is no statutory sanction for a removal under those circumstances. The FAA does not have the power to legislate. Until such time as Congress appropriately modifies or changes existing law, the action of the agency herein was illegal as a matter of law, and in excess of its statutory authority, jurisdiction and limitations.

CONCLUSION

THE ADVERSE DETERMINATION MADE BY THE REGIONAL DIRECTOR MUST BE REVERSED. CORRECTIVE ACTION IS REQUIRED. THE DISMISSAL SHOULD BE RESCINDED AND APPELLANT REINSTATED TO HIS GS-9 POSITION.

DATED: New York, April 9, 1973.

Respectfully submitted,

SAMUEL PESNICOFF, Esq.
Attorney for Appellant.

Schedule "B", Annexed to Complaint.

BOARD OF APPEALS AND REVIEW UNITED STATES CIVIL SERVICE COMMISSION WASHINGTON, D. C., 20415

In the Matter of the Appeal of

THOMAS BEVILACQUE.

Appellant.

PRELIMINARY STATEMENT

employee, occupying a position in the classified civil service, appeals from a determination dated February 15, 1973, by Appeals Examiner BERT GANZER for the Regional Director, New York Region, sustaining the action of the New York Federal Aviation Administration, which removed appellant from his position of AIR TRAFFIC CONTROL SPECIALIST, GS-9, Step 1, effective May 5, 1972. The appeal before the Regional Director came on before Appeals Examiner SIDNEY M. SITVER on December 27, 1972.

There was no hearing at the agency level prior to termination.



THE FACTS

Appellant commenced employment with FAA as an Air Traffic Control Specialist, GS=7, on or about July 20, 1970 (p. 74). Upon completion of his probationary period, he was promoted to Air Traffic Control Specialist, GS=9, on January 24, 1971 (p. 75). It is conceded that as a GS=9, his work performance was satisfactory.

By letter dated 8 March 1972, the Acting Facility Chief advised appellant that he proposed to remove him from his position, etc., because of his "failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller." By letter dated 28 April, 1972, the Facility Chief informed appellant of his dismissal effective 5 May 1972.

It is conceded that appellant was not given a hearing by the agency prior to his termination.

THE ISSUES

There are a number of issues involved in this matter. Primarily they may be divided in two categories:

- legal and consistent with decisional law?

 If the agency violated appellant's procedural rights, then its action was clearly illegal, in that it denied to appellant procedural due process and the equal protection of the laws.

 In connection therewith, should the BOARD OF APPEALS AND REVIEW sustain this contention, then, of course, it would be unnecessary to consider and review the other objections being reised herein.
- 2) Without waiving the efficacy of our contention that everything done by the agency was illegal as a matter of law, appellant further contends that the action of the agency in summarily separating him was in excess of its statutory authority, jurisdiction and limitations; and that his removal was discriminatory, arbitrary, capricious and unreasonable.

These contentions will be discussed seriatim.

POINT I.

THE ACTION OF THE AGENCY IN SUMMARILY TERMINATING APPELLANT WITHOUT GIVING HIM A HEARING PRIOR TO TERMINATION, WAS ILLEGAL, IMPROPER AND CONTRARY TO DECISIONAL LAW.

It is basic, fundamental and axiomatic that the Courts will not sanction an administrative action which denied the employee an opportunity of being heard before the drastic penalty of dismissal was imposed.

Appellant's right to continued employment could not be constitutionally withheld. He had more than a mere subjective "expectancy". He enjoyed "a property interest in continued employment" (PERRY v. SINDERMAN, 408 U.S. 593, and BOARD OF REGENTS v. ROTH, 408 U.S. 564, decided June 29, 1972).

Appellant was a career amployee occupying a competitive civil service position. As a tenured employee, he could not be removed without a hearing. In the cases of PERRY v. SINDERMAN and BOARD OF RECENTS v. ROTH, supra, the Supreme Court held that employment was a "property right" which could not be summarily dissipated without a hearing. In KENNEDY v. SANCHEZ, decided October 24, 1972, by a three-Judge Statutory Court in the Northern District of Illinois, Judge McLAREN writing unanimously for the Court,

50a

Schedule "B".

held that any rule, regulation or statute which terminated the employment of a non-probationary Federal employee in the competitive civil service without a full evidentiary hearing prior to termination was a violation of the Fifth Amendment of the United States Constitution. In <u>FITZGERALD v. HAMPTON</u>, 329 F. Supp. 997, the Court also held that a Federal civilian employee was entitled to a hearing.

The above decisions are binding on the BOARD OF APPEALS AND REVIEW. The decisions by the Supreme Court of the United States in ROTH and SINDERMAN, supra, are final. There is no further avenue of appeal from said decisions. Since the decisions in KENNEDY v. SANCHEZ and FITZGERALD v. HAMPTON were not stayed, they must be followed by this BOARD.

and a property right to his position which included continuity of employment. The right to continuity of employment was and is a constitutionally protected property right. In <u>GOLDBERG</u>

<u>v. KELLY</u>, 397 U.S. 254, the Supreme Court of the United States held that the "rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scrutiny."

51a

Schedule "B".

In the notice of proposed removal dated 8 March 1972, the Facility Chief stated "This is notice that I propose to remove you from your position as Air Traffic Control Specialist (Center) GS-2152-9 *** ." In the paragraph preceding the last paragraph of said notice, the statement also appeared "Full consideration will be given to any reply you submit."

It is our contention that the agency in its charging letter decided to dismiss appellant even before any reply was submitted by him. The action of the agency in permitting appellant an opportunity to submit a reply was merely a token compliance with the statute, and was merely a form preceding a predetermined removal.

MORMAN FINKELSTEIN who was employed as a Motion Picture Film Cleaning Muchine Operator, WB-3, ARMY PICTORIAL CENTER.

On February 14, 1962, he was served with a letter of charges which advised him that "it is proposed to effect your removal effective March 20, 1962, for lack of dependability, was ." Mr. FINKELSTEIN was dismissed. An appeal was filed with the Regional Director, Second U. S. Civil Service Region. A hearing was held on June 6, 1962. On July 10, 1962, the Regional Director sustained the dismissal. An

52a Schedule "B". REVIEW in annulling the dismissal, held:

7. ."

appeal was taken to the BOARD OF APPEALS AND REVIEW. By letter dated October 11, 1962, the BOARD OF APPEALS AND

> "The net effect was that the employee was denied any advance notice before the decision was made and was foreclosed of any effective action on his part to escape the removal action. This was fatal procedural error."

The action of the agency in failing to give appellant herein a full evidentiary hearing prior to termination deprived him of his constitutional rights to procedural due process and the equal protection of the laws.

Under the circumstances, corrective action must be taken and an order should issue directing appellant's reinstatement.

POINT II.

THE ACTION OF THE AGENCY IN TERMINATING APPELLANT BESIDES BEING ILLEGAL AND IMPROPER. WAS IN EXCESS OF ITS STATUTORY AUTHORITY, JURISDICTION AND LIMITATIONS, AND WAS ARBITRARY, CAPRICIOUS, DISCPIMINATORY AND UNPEASONABLE.

It is conceded that every government agency has the right to promulgate rules and regulations. However, the rules so established may not contravene basic statutes. This is particularly true for the area of separation and removal where uniformity, equality, certainty and security

are so essential if civil service efficiency and morale are to be maintained. The Civil Service provisions are intended as a protection for all employees in the civil service. The purpose of civil service is to protect the diligent, conscientious and competent employee. All of the statutes, rules and regulations pertaining to civil service are an attempt by Congress to hold agencies and heads of departments to a standard of social justice in their dealings with competitive civil service employees. The statutes, etc., are to be interpreted with a degree of liberality essential to the attainment of that end in view. This principle is imbedded in public pelicy and may not be uprooted by any scheme or plan or even a well-intentioned denial.

Appellant is of course entitled to challenge the dismissal determination as based upon errors of law and as lacking supporting substantial evidence. Such a challenge entails a judicial review of the administrative decision to determine whether it was based upon substantial evidence and free from errors of law, fraud, bad faith and arbitrary action (UNITED STATES v. CARLO BIANCHI & CO., 373 U.S. 709, and KOPPERS CO. v. U.S., 186 Ct. Cl. 142, 405 F. 2d 554).

As a CS-9, appellant's work performance was satisfactory (p. 84). Appellant did not request to go to Oklahoma. In this connection, the following testimony was

elicited (p. 75):

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- *Q. Now sometime in 1971 you were sent to Oklahoma, is that correct?
- A. That's correct.
- Q. Do you know why you were sent to Oklahoma?
- A. They told me that my turn came up to go down to Manual Control School.
- Q. And you went.
- A. Yes, I went."

Significantly, when appellant was hired as a GS-7, the offer of appointment which he received did not state that his retention of employment would be dependent upon promotional advancement (Hearing Exhibit #4, p. 74).

Appellant testified as follows (p. 84):

- *Q. At any time, either as a 7 or as a 9, were you ever informed that it would be necessary for you to pass a promotional examination to be retained in your present grade?
- A. No."

Appellant %estified (p. 77) that he "ranked amongst the top of the class", and that he "gave many problems to many fellow classmates that needed help down in Oklahoma City" (p. 77). This, of course, evidenced

55a Schedule "B".

merit, fitness and ability on the part of appellant.

CHARLIS COLABUFO, a GS-14, Team Supervisor at the FAA, testified that appellant as a GS-9 performed satisfactorily and that appellant "has the potential to become a controller" (pp. 55-56). Mr. COLABUFO also testified (p. 59) that appellant "was not afforded as many pre-school training problems as other people had." Despite COLABUFO's request that appellant be given additional training (pp. 43-44, Hearing Exhibit #2), the request was denied (p. 44, Hearing Exhibit #3).

The witness ROBERT W. BARRINGER, a GS-11, testified that he trained appellant and gave him problems dealing with aircraft, separation, etc., and that appellant passed the problems. The following testimony was elicited (p. 66):

- *Q. In your opinion did he successfully answer the questions that you posed to him on each problem?
- A. He successfully progressed in the ensuing weeks as we progressed along the line so to speak. We put him on more aircraft with more and more difficult situations, so he was progressing."

By stipulation (pp. 99-100) it was agreed that were a RUSSELL WEXLER, a GS-13, called as a witness, he would testify that he gave non-radar problems to appellant,

56a Schedule "B".

and that appellant satisfactorily answered the questions.

Significantly, the agency did not produce

JOHN ANMANN who gave problem #24 to appellant, and JOHN

CARUSO who administered problem #23, Sector 11, to appellant.

The agency witness DE LUCA who was called by the agency
in lieu of the Instructors, was evasive and vacillating.

On cross-examination, the following occurred (p. 22):

- "Q. And what was wrong with that? What was....
 what was his answer? Mr. Bevilacque's
 answer to the problem?

 Do you know how the problem was posed?
- A. What do you mean, 'pesed'."

Similarly on p. 23:

- PQ. And what was wrong with that, at what point would they intersect?
- A. I den't know. What do you mean at what point? * * *.*

In view of appellant's testimony that he passed the problems (pp. 77, 78 and 79) and that the Instructor was in deubt and had to consult others (p.78), it was incumbent upon the agency to produce the Instructors AMMANN and CARUSO.

57a Schedule "B". Appellant was entitled to confrontation and cross-examination. The failure to produce said Instructors who were agency witnesses and subject to its call, deprived appellant of a substantial right which operated to his prejudice, damage and detriment. Neither appellant nor his representative was in a position to cross-examine a report. In his decision (p. 5) Appeals Examiner EERT GANZER (who did not conduct the hearing) stated: "Because Air Traffic Controllers are responsible for the lives and safety of the flying public, it is reasonable and proper that they pass through a training program and demonstrate appropriate skill and competence in order to progress to more difficult assignments." Appellant does not dispute that statement. It is prejudicial however, insofar as appellant is concerned. There is no charge and there never was a charge that appellant herein did not satisfactorily perform his functions and duties as a Grade 9. The charge herein (which is seriously challenged by appellant) is that appellant failed to pass problems which would have made him eligible for promotion to Grade 11. Appellant neither filed for nor sought promotion to Grade 11. He had no choice. According to the policy of the agency it was "do or die". There is no statutory sanction for a removal under those circumstances. The FAA does not have the power to legislate. Until such time as Congress appropriately modifies or changes existing law, the action of the - 12 -

agency herein was illegal as a matter of law, and in excess of its statutory authority, jurisdiction and limitations.

CONCLUSION

THE ADVERSE DETERMINATION MADE BY THE REGIONAL DIRECTOR MUST BE REVERSED. CORRECTIVE ACTION IS REQUIRED. THE DISMISSAL SHOULD BE RESCINDED AND APPELLANT REINSTATED TO HIS GS-9 POSITION.

DATED: New York, March 8, 1973.

Respectfully submitted,

SAMUEL RESNICOFF, Esq.
Attorney for Appellant.

Schedule "C", Annexed to Complaint.

BOARD OF APPEALS AND REVIEW UNITED STATES CIVIL SERVICE COMMISSION WASHINGTON, D. C., 20415

In the Matter of the Appeal of

LOUIS OF RESLER.

Appellant.

PRELIMINARY STATEMENT

Appellant, an honorably discharged veteran with more than twenty-three years of military service, and a tenured competitive rivil service employee occupying a position in the classified divil service, appeals from a determination dated May 22, 1973, by Appeals Examiner BERT GANZER for the Regional Director, New York Region, sustaining the action of the New York Federal Aviation Administration which dismissed him from his position of AIR TRAFFIC CONTROL. SPECIALIST (Genter), GE-9, effective April 28, 1972. The appeal before the Regional Director came on before Mearing Officer ROBERT J. SHIELDS on Merch 21, 1973.

Although appellant is an honorably discharged; veteron, he was not given a hearing at the agency level prior to termination.

THE FACTS

Appellant commenced employment with FAA as an Air Traffic Control Specialist, GS-7, on December 29, 1969 (p. 35). Upon completion of his probationary period, he was premoted to Air Traffic Control Specialist, GS-9 in January 1971. No evidence was introduced to impugn the quality or quantity of appellant's performance. It was conceded that as a GS-9, appellant's work performance was satisfactory (pp. 3-5, hearing March 21, 1973).

By letter dated 8 March 1972, the (Acting) Facility Chief advised appellant that he proposed to remove him from his position, etc., because of his "failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller." By letter dated 19 April 1972, the Facility Chief informed appellant of his dismissal effective 28 April 1972, because of his failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller.

THE ISSUES

There are a number of issues involved in this appeal. Primarily, they may be divided in two categories:

- legal and consistent with decisional law.

 If the agency violated appellant's procedural rights, then its action was clearly illegal, in that it denied to appellant procedural due process and the equal protection of the laws.

 In connection therewith, should the BOARD OF APPEALS AND REVIEW sustain this contention, then, of course, it would be unnecessary to consider and review the other objections being raised herein.
- that everything done by the agency was illegal as a matter of law, appellant further contends that the action of the agency in summarily dismissing him was in excess of its statutory authority, jurisdiction and limitations; that his removal was discriminatory, arbitrary, capricious and unreasonable, and that the agency failed to demonstrate that appellant did not qualify for promotion under the agency's national standards.

These contentions will be discussed seriatim.

Schodule "C".

FOINT I.

THE ACTION OF THE AGENCY IN SUMMARILY TERMINATING APPELLANT WITHOUT GIVING HIM A HEARING PRIOR TO TERMINATION, WAS ILLEGAL, IMPROPER AND CONTRARY TO DECISIONAL LAW.

It is basic, fundamental and axiomatic that the Courts will not sanction an administrative action which denied the employee an opportunity of being heard before the drastic penalty of dismissal was imposed.

Appellant's right to continued employment could not be constitutionally withheld. He had more than a mere subjective "expectancy". He enjoyed "a property interest in continued employment" (PERRY v. SINDERMAN, 408 U.S. 593, and BOARD OF REGENTS v. ROTH, 408 U.S. 564, decided June 29, 1972).

eccupying a competitive civil service position. As a tenured employee he could not be removed without a hearing. In the cases of PERRY v. SINDERMAN and BOARD OF REGENTS v. ROTH.

supra, the Supreme Court held that employment was a "property right" which could not be summarily dissipated without a hearing. In KENNEDY v. SANCHEZ, decided October 24, 1972, by a three-Judge Statutory Court in the Northern District of Illinois, Judge McLAREN writing unanimously for the Court, held that any rule, regulation or statute which

63a

Schedule "C".

terminated the employment of a non-probationary Federal employee in the competitive civil service without a full evidentiary hearing <u>prior</u> to termination was a violation of the FIFTH AMENDMENT of the United States Constitution. In <u>FITZGERAID v. HAMPTON</u>, 329 F. Supp. 997, the Court also held that a Federal civilian employee was entitled to a hearing.

The above decisions are binding on the BOARD OF APPEALS AND REVIEW. The decisions by the SUPREME COURT OF THE UNITED STATES in ROTH and SINDERMAN, supra, are final. There is no further avenue of appeal from said decisions. Since the decisions in KENNEDY v. SANCHEZ and FITZGERALD v. HAMPTON were not stayed, they must be followed by this BOARD.

As a veteran and a permanent employee, appellant acquired tenure and a property right to his position which included continuity of employment. The right to continuity of employment was and is a constitutionally protected property right. In GOLDBERG v. KELLY, 397 U.S. 254, the Supreme Court of the United States held that the "rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scrutiny."

In the notice of proposed removal dated 8 March 1972, the (Acting) Facility Chief stated "This is notice that I proposed to remove you from your position as Air Traffic Central Specialist (Center) 65-2152-9, ***." On the third page of said notice, the statement also appeared "Fail consideration will be given to any reply you submit." There was nothing to indicate in said notice that the penalty could also be a demotion in grade, suspension or a reprimend.

It is our contention that the agency in its
charging letter decided to dismiss appellant even before
any reply was submitted by him. The action of the agency
in permitting appellant an opportunity to submit a reply
was merely a token compliance with the statute and was merely
a form preceding a predetermined remained. The agency had
adopted a "policy" of dismissing all of its tenured employees
who could not pass the agency's standards for promotion
[mational standards have been ignored). The agency's
decision to dismiss was quite obvious.

A similar situation arose in the case of NORMAN
FINKELSTEIN who was employed as a Motion Picture Film Cleaning
Machine Operator, WB-3, ARMY PICTORIAL CENTER. On February
18, 1962, he was served with a letter of charges which
advised him that "it is proposed to effect your removal
effective March 20, 1962, for lack of dependability, """."

Mr. FINKELSTEIN was dismissed. An appeal was filed with the Regional Director, Second U. S. Civil Service Region. A hearing was held on June 6, 1962. On July 10, 1962, the Regional Director sustained the dismissal. An appeal was taken to the BOARD OF APPEALS AND REVIEW. By letter dated October 11, 1962, the BOARD OF APPEALS AND REVIEW in annulling the dismissal, held:

"The net effect was that the employee was denied any advance notice before the decision was made and was foreclosed of any effective action on his part to escape the removal action. This was fatal procedural error."

Pursuant to the decision of the BOARD OF APPEALS AND REVIEW. Mr. FINKELSTEIN was reinstated.

The action of the agency in failing to give appellant herein a full evidentiary hearing prior to termination deprived him of his constitutional rights to procedural due process and the equal protection of the laws.

Under the circumstances, corrective action must be taken and an order should issue directing appellant's reinstatement.

POINT II.

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THE ACTION OF THE AGENCY IN TERMINATING APPELLANT BESIDES BEING ILLEGAL AND IMPROPER, WAS IN EXCESS OF ITS STATUTORY AUTHORITY, JURISDICTION AND LIMITATIONS, AND WAS ARBITRARY, CAPRICIOUS, DISCRIMINATORY AND UNREASONABLE.
MOREOVER, THE AGENCY FAILED TO PLEAD AND PROVE THAT APPELLANT FAILED TO QUALIFY FOR PROMOTION UNDER NATIONAL STANDARDS AND NOT LOCAL FACILITY STANDARDS.

It is conceded that every government agency has the right to promulgate rules and regulations. However, the rules so established may not contravene basic statutes. This is particularly true in the area of separation and removal where uniformity, equality, certainty and security are so essential if civil service efficiency and morale are to be maintained. The Civil Service provisions are intended as a protection for all employees in the civil service. The purpose of civil service is to protect the diligent, conscientious and competent employee. All of the statutes, rules and regulations pertaining to civil service are an attempt by congress to hold agencies and heads of departments to a standard of social justice in their dealings with competitive civil service employees. The statutes, etc., are to be interpreted with a degree of liberality essential to the attainment of that end in view. This principle is imbedded in public policy and may not uprooted by any scheme or plan or even a well-intentioned denial.

Appellant is of course entitled to shallenge the dismissal determination as based upon errors of law and as lacking supporting substantial evidence. Such a challenge entails a judicial review of the administrative decisions to determine whether it was based upon substantial evidence and free from errors of law, fraud, bath faith and arbitrary action (UNITED STATES v. CARLO BIANCHI & CO., 373 U.S. 709, and KOPPERS CO. v. U. S., 186 Ct. Cl. 142, 405 F. 2d 554).

On September 20, 1972, appellant was afforded an apportunity of making an alleged eral reply. A cursory examination of the reply recorded on that day will readily displace that it was not an oral reply as contemplated by 5 C.F.R. par. 732.202 (b), MASHINGTON v. U. S., 137 Ct. Cls. 344, and CAMEFO v. U. S., 179 Ct. Cls. 192.

The Commission's file reflects that on September 20, 1972, a "hearing" (and the term is used advisedly) was held at the agency, at which time appellant appeared with an employee representative of the Union, who was not an attorney. This hearing was <u>subsequent</u> to appellant's dismissal which was accomplished on April 28, 1972. The entire episode was an exercise in futility. Appellant did not have meaningful representation. In fact, the Hearing Officer realizing the inadequacy of the representation stated (p. 43, minutes September 20, 1972):

"Mr. Kerr, it might be unusual, but since you are somewhat new at this *** ."

The netice of proposed removal set forth one reason for appellant's removal and cited eight problems in support thereof. The Appeals Examiner to the prejudice of appellant ruled that appellant was given a hearing on September 20, 1972. A cursory examination of the transcript will readily disclose that there was no hearing. At a hearing, the onus is upon the agency to plead and prove the specifications which it preferred. The agency offered no proof. None of the Instructors who posed the problems to appellant were produced or made available as witnesses. In lieu thereof, Mr. LOWELL, the Evaluation and Preficiency Development Officer was called as a witness by appellant's union representative.

At the hearing before the Regional Director, appellant was denied his fundamental right of confrontation and cross-examination. It was incumbent upon the agency to produce the individuals who acted as Instructors and make them available for cross-examination. These so-called Instructors were never made available by the agency for cross-examination. The notice of proposed removal was not the gospel. In this connection, the following colloquy occurred (p. 31):

"MR. SHIELDS: I think the document speaks for itself.

MR. HALLORAN: Then why are we going into this testimony?

MR. RESNICOFF: But by the same token none of, these people are here and I have the right to cross-examine them. I cannot be limited to cross-examining a sheet of paper."

It was incumbent upon the agency to produce the so-called Instructors and make them available for cross-examination. This was an adverse action. Appellant, a tenured veteran, was being dismissed. He had a property right to his position. According to the agency, the notice of proposed removal constituted the record, and that pur as was sufficient to dismiss without supporting sworn testimony. The Appeals Examiner upheld that contention. Such a ruling is obviously illegal and improper; contrary to procedural due process, and denied to appellant the equal protection of the laws.

Upon what basis did Mr. LOWELL select the Instructors? What special knowledge or expertise did they possess which qualified them to teach, examine and evaluate? Were they acting out-of-title? Were they in fact qualified? Appellant and his legal representative had the right to explore these issues which were of paramount importance.

The failure, therefore, on the part of the agency

70a

Schedule "C".

to produce the Instructors and make them available for cross-examination, denied to appellant procedural due process. Neither appellant nor his counsel could cross-examine a written report. Moreover, appellant without contradiction, testified that he disputed the alleged conflicts (pp. 39-40). Cross-examination on the alleged conflicts was crucial. The mere allegation in the notice of proposed removal that there were conflicts, was legally insufficient to warrant a conclusion based thereon.

The record is absolutely barren of any evidence to establish the agency's national standards for promotion. The evidence adduced at the hearing abundantly established that selections for developmental training for promotion were made on a haphazard basis and that the employee could even be selected the day following his promotion to a higher grade. Such an arbitrary selection was neither persuasive nor sound. The Evaluation Proficiency Developmental Officer did not discuss with the Team Supervisor the appellant's potential at the time. Since appellant had been in grade as a 9 for only several months, the action of the official in designating him to go to school without even a discussion with his Team Supervisor as to appellant's fitness at that time, clearly betokens the arbitrary and irrational manner in which the official made the selection.

71a Schedule "C".

Appellant, testifying on his own behalf, with commendable candor, succinctly set forth his personal problems (pp. 40-41). Appellant also testified that he was not given sufficient pre-training and was not ready for Oklahoma City, because he was only given approximately.

25 informal problems (p. 38). Of particular importance is the testimony of the agency witness (p. 14) that the letter which appellant received directing him to report to Oklahoma did not advise him of his right to seek or request a deferment.

It is obvious, therefore, that Mr. LOWELL's action in selecting appellant to go to school without first even making a preliminary investigation to determine his fitness, was not only haphazard and irrational, but arbitrary, capricious, and a waste of Government funds in view of the Order dated 20 November 1970, dealing with "Non-Assignment of unsatisfactory personnel to developmental training classes."

Although appellant was a tenured veteran, the agency in lieu of dismissal made no offer of employment or reassignment. On pages 46-47 (Minutes dated March 21, 1973), the following testimony was elicited:

"MR. SHIELDS: Go shead, Mr. Resnicoff.

- Q. Now, prior or after your termination were you offered any kind of position?
- A. No.
- Q. By the agency?
- A. No. I was never offered any position."

The decision of the Appeals Examiner is conspicuously silent on this issue.

one observation is quite pertinent. In its haste to advance Air Traffic Control Specialists to GS-11, GS-12 and GS-13 positions, the agency will within the immediate future have an overabundance and a surplus of personnel in these high-ranking positions. They will be overstacked like planes backing up in zero visibility. Not only will the 12's and 13's be performing the functions of 9's and 11's but a reduction-in-force will inevitably result. The handwriting is on the wall and unless this unfair, illegal and inequitable policy is corrected, the COMMISSION in the not-too-distant future will be confronted with a plethora of "riff" appeals.

73a
Schedule "C".

There is no charge (and the that appellant herein did not satisfations and duties as a GS-9. App

that appellant herein did not satisfactorily perform his functions and duties as a GS-9. Appellant neither filed for nor sought promotion to GS-11. He had no choice. According to the policy of the agency it was "do or die." There is no statutory sanction for a removal under those circumstances. The FAA does not have the power to legislate. Until such time as Congress appropriately modifies or changes existing law the action of the agency herein was illegal as a matter of law, and in excess of its statutory authority, jurisdiction and limitations.

Additionally, in summarily dismissing appellant, the agency was guided by its local facility standards.

Those standards were not paramount but ancillary to the agency's national standards (BOARD OF APPEALS AND REVIEW decision in GEORGE W. VALENTINE dated April 30, 1973).

The Appeals Examiner in sustaining the agency action stated:

"We can find nothing in the record to indicate any court decisions that would support the position that a hearing afforded the appellant subsequent to his removal was in violation of the due process requirements of the law."

This statement is not only erroneous but inaccurate. The principle of law was discussed on pp. 7 - 8 (Hearing Minutes,

March 21, 1973). In <u>KENNEDY</u>, et al. v. SANCHEZ, et al., (#72 C 771), a three-Judge Statutory Court, United States District Court, Northern District of Illinois, vacated and set aside the dismissal of a veteran who was dismissed without a full evidentiary hearing prior to termination. United States District Judge McLAREN wrote unanimously for the Court (October 24, 1972). Section 7502, Title 5, U.S.C. and all the related rules and regulations were declared unconstitutional.

CONCLUSION

THE ADVERSE DETERMINATION MADE BY THE RECICNAL DIRECTOR MUST BE REVERSED. CORRECTIVE ACTION IS REQUIRED. THE DISMISSAL SHOULD BE PESCINDED AND APPELLANT PEINSTATED TO HIS GS-9 POSITION.

DATED: New York, June 25, 1973,

Respectfully submitted,

SAMUEL RESNICOFF, Esq.
Attorney for Appellant.

Schedule "D", Annexed to Complaint.

BOARD OF APPEALS AND REVIEW
UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C., 20415

In the Matter of the Appeal of

JOHN J. SHAMION.

Appellant.

PRELIMINARY STATEMENT

Appellant, an honorably discharged veteran of World War II and the Korean War, and a tenured competitive civil service employee occupying a position in the classified civil service, appeals from a determination dated May 7, 1973, by Appeals Examiner BERT CANZER for the Regional Director, New York Region, sustaining the action of the New York Federal Aviation Administration, which dismissed him from his position of AIR TRAFFIC CONTROL SPECIALIST, GS-2152-9, effective May 5, 1972. The appeal before the Regional Director came on before Hearing Officer SIDNEY M. SITVER on February 8, 1973.

Although appellant is an honorably discharged yeteran, ho was not given a hearing at the agency level prior to termination.

THE PACTS

Appellant commonced employment with FAA as an Air Traffic Control Specialist, GS=7, on June 29, 1970 (p. 19). Upon completion of his probationary period, he was promoted to Air Traffic Control Specialist, GS=9, on February 7, 1971. No evidence was introduced to impugn the quality or quantity of appellant's performance. It was conceded that as a GS=9, appellant's work performance was satisfactory.

Chief advised appellant that he proposed to remove him from his position, etc., because of his "failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller." By letter dated 19 April 1972, the Facility Chief informed appellant of his dismissal effective 28 April 1972, because of his failure to satisfactorily complete upgrade training requirements for the position of Manual/Interphone Controller. The dismissal was thereafter extended to May 5, 1972.

THE ISSUES

There are a number of issues involved in this appeal. Primarily, they may be divided in two categories:

- 1) was the cummary termination of appellant legal and consistent with decisional law? If the agency violated appellant's procedural rights, then its action was clearly illegal, in that it denied to appellant procedural due process and the equal protection of the laws. In connection therewith, should the DOARD OF APPEALS AND REVIEW custain this contention. then, of course, it would be unnecessary to confider and review the other objections being raised herein.
- 2) Without walving the officesy of our contention that everything done by the agency was illegal as a matter of law, appellant further contends that the action of the agency in summarily dismissing him was in excess of its statutory authority, jurisdiction and limitations; that his removal was discriminatory, artitrary, capricious and unrescenable, and that the agency falled to demonstrate that appellant

78a Schedule "D". did not qualify for promotion under the agency's national standards. These contentions will be discussed seriatim. POINT I. THE ACTION OF THE AGENCY IN SUMMARILY TERMINATING APPELLANT WITHOUT GIVING HIM A HEARING PRIOR TO TERMINATION, WAS ILLEGAL, IMPROPER AND CONTRARY TO DECISIONAL LAW. It is basic, fundamental and axiomatic that the Courts will not sanction an administrative action which denied the employee an apportunity of being heard before the drastic penalty of dismissal was imposed. Appellent's right to continued employment could not be constitutionally withheld. He had more than a mare subjective "expediency". He enjoyed "a property interest in continued employment" (PERRY v. SINDERMAN, 408 U.S. 593, and ECARD OF REGENTS v. ROTH, 408 U.S. 564, docided June 29, 1972). . - 4 -

Appellant, a voteran, was a career employee occupying a competitive civil corvice position. As a tenured employee he could not be removed without a hearing. In the cases of PERRY v. SINDERMAN and DOADD OF DIGENTS v. ROTH, cupra, the Supreme Court held that employment was a "proporty micht" which could not be cummerily dissipated without a hoaring. In KENNEDY v. SALTITZ, decided October 24, 1972, by a three-Judge Statutory Court in the Morthem District of Illinois, Judge MalaRen waiting unanimously for the Court, held that any rule, regulation or etatute which terminated the employment of a non-probationary Federal employee in the competitive civil actives without a full evidentiary hearing prior to termination was a violation of the FIFTH ALEMDMENT of the United States Constitution. In FITZGERAIDes. NAMETON, 329 F. Supp. 997, the Court also held that a Federal civilian employee was entitled to a hearing.

The above decisions are binding on the DOARD OF APPEALS AID REVIEW. The decisions by the SUTREME COURT OF THE UNITED STATES in BOTH and SITTED AND, supra, are final. There is no further avenue of appeal from said decisions. Since the decisions in MINITED w. SANDING and FITZEPAID v.

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As a voteran and a permanent employee, appellant acquired tenure and a property right to his position which included continuity of employment. The right to continuity of employment was and is a constitutionally protected property right. In COUNTING v. MILLY, 007 U.S. 254, the Supreme Court of the United States held that the "rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under corutiny."

In the notice of proposed removal dated 3 March 1972, the Acting Feeility Chief stated "This is notice that I propose to remove you from your position of Air Traffic Central Specialist (Center) 62-2152-7, max." On the third page of said notice, the statement also appeared "Full consideration will be given to any reply you submit."

There was nothing to indicate in said notice that the penalty could also be a demotion in grade, suspension or a reprimend.

charging letter decided to dismiss appellant even before any reply was submitted by him. The action of the agency in permitting appellant an appertunity to submit a reply was morely a token compliance with the statute and was merely a form preceding a prodetermined removal. The agency had adopted a "policy" of dismissing all of its tenured employees

81a Schedule "D". to dismiss was quite obvious.

who could not pass the agency's standards for promotion (national standards have been ignated). The agency's decicion

A similar situation arose in the case of MORMAN FINCULSTEIN who was employed as a Motion Picture Film Gleaning Machine Operator, WB-3, ARMY FICTORIAL GENTER. On February 14, 1962, he was served with a letter of charges which advised him that "it is proposed to effect your removal offeetive Mirch 20, 1902, for lack of dependability, ***.* Mr. PINCELOTTIN was dismissed. An appeal was filed with the Regional Director, Second U. S. Givil Service Region. A hearing was held on June 6, 1962. On July 10, 1962, the Regional Director custoined the dismissal. An espeal was taken to the DOARD OF APPEALS AND MINIEW. Dy letter dated Cotober 11, 1962, the DOARD OF ADVELLS AND REVIEW in . ennulling the dismissal, held:

> "The not effect was that the employee was demied any advance notice before the decision was made and was forcelesed of any effective estion on his part to escape the removal action. This was fatal procedural error."

Purcuint to the decision of the DOARD OF APPEALS AND REVIEW, Mr. FIRELSTIN was reinstated.

82a Schedule "D". The action of the agency in failing to give appellant horein a full evidentiary hearing prior to termination deprived him of his constitutional rights to procedural due process and the equal protection of the laws. Under the circumstances, corrective action must be taken and an order should issue directing appellant's reinstatement. POINT II. THE ACTION OF THE AGENCY IN TERMINATING APPELLANT BESIDES BEING ILLEGAL AND INPROPER, WAS IN ENGESS OF ITS STATUTORY AUTHORITY.

JURISDICTION AND LIMITATIONS, AND WAS ARBITRARY,

CAPRICIOUS, DISCRIMINATORY AND UNREASONABLE. MICHEOVER, THE ACTION FAILED TO PLEAD AND PROVE THAT APPELLANT FAILED TO QUALIFY FOR PROMOTION UNDER NATIONAL STANDARDS AND NOT LOCAL FACILITY STANDARDS. It is conceded that every government agency has the right to promulgate rules and regulations. However, the co established may not centravene basic statutes. This is particularly true in the area of separation and removal where uniformity, equality, cortainty and security are so occential if civil corvice efficiency and morale are to be maintained. The Civil Service provisions are intended as a protection for all employees in the civil service. The purpose of civil service is to protect the diligent, conscientious and competent employee. All of the statutes, - 8 -

rules and regulations pertaining to civil corvice are an attempt by Congress to hold egencies and heads of departments to a standard of social justice in their dealings with competitive civil service employees. The statutes, etc., are to be interpreted with a degree of liberality essential to the attainment of that and in view. This principle is imbedded in public policy and may not be uprocted by any coheme or plan or even a well-intentioned denial.

Appellant is of course entitled to challenge the dismissal determination as based upon errors of law and as lacking supporting substantial evidence. Such a challenge entails a judicial review of the administrative decisions to determine whether it was based upon substantial evidence and free from errors of law, froud, bad faith and arbitrary cotton (TTTPD-STATES v. CARTO BEAUTY 2. CO., 373 U.S. 709, and TTTTPD-STATES v. CARTO BEAUTY 2. CO., 373 U.S. 709,

On March 27, 1972, appellant was afforded an apportunity of making an eral reply. A cureary examination of the paper paperdod on that day will readily disclose that it was not an eral reply as contemplated by 5 G.F.R. par. 752.032 (b), PASTRITTOT v. U. S., 107 St. Cls. 044, and CATTO v. U. S., 179 St. Cls. 192.

In the notice of proposed removal, coven alleged uncatisfactory performances were alleged. The CCMMISSION's file reflects that on August 15, 1972, a hearing was held at the agency, at which time appellant was represented by a Union official who was not an attempty (and who in fact stated it was his first hearing, pp. 10, 13, of August 15, 1972 minutes). The entire epicode was an exercise in Sutility. Appellant did not have meaningful representation. None of the Instructors who peeed the problems to appellant were produced or made available. In liqu thereof, Mr. LCMELL, the Evaluation and Proficiency Development Officer was called as a witness by the agency. In bread general language, Mr. LOWELL (p. 94) stated that appellant took three evaluation problems and failed them. The witness also testified that the Academy at Chlahoma City called him and reported that appellant's progress was uncaticfactory (p. 91).

At the hearing before the Regional Director, appellant was denied his fundamental right of confrontation and cross-examination. It was insumbent upon the agency to produce the individuals who acted as Instructors and make them available for cross-examination. These so-called Instructors were never made available by the agency for cross-examination.

The what basis did Mr. LCMILL select the Instructors? What special knowledge or expectise did they possess which qualified them to teach, examine and evaluate? Were they acting out-of-title? Were they in fact qualified? Appollant had the right to explore these issues.

The failure, therefore, on the part of the agency to produce the Instructors at the heaving and make them available for process examination, denied to appellant arccodural due process and the equal protection of the laws. Neither appellant nor his counsel could process examine a written report.

The record is absolutely harron of any evidence to establish the agency's national standards for premotion. The evidence adduced at the hearing abundantly established that selections for developmental training for premotion were made on a haphacerd basis and that the employee sould be selected the day following his promotion to a higher grade. This ambitrary selection is neither persuasive nor sound. The Evaluation Proficiency Developmental Officer did not discuss with the Team Supervisor appellant's potential at the time. Since appellant had been in grade as a 9 for only asveral manths, the action of the official in designating him to go to school without even a discussion with his Team Supervisor as to appellant's fitness at that time, clearly

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86a Schedule "D". official made the soloction. Appellant, tostifying on his own buholf, with

betchens the arbitrary and irretional manner in which the

commendable candor, sussinably set forth his personal problems (pp. 81, 82, 101, 102 and 183). Appellant also tootified that he was not given sufficient pro-training and was not ready for Oklahema Glay. Mr. DIMME, a Radar Controller, GS-13, testified appollent was not ready to go to school (p. 58); that oppollant had Classical problems, and that 50, 80, or 100 problems should be administered before formal training. Im. DERIVED, a Rader Controller, GB-13, cloo testified that the Controllers in appellant's crew fell "that he (appellant) chould not have attended cuhool (p. 75): The mitness clop tostified that the Team Compensions a Mr. IIIIIDO otated that although empellant mas not ready to go to school, the Team Supervicer could not interrode because Mr. LOWELL had made the colection.

It is obvious, therefore, that Mr. LOWELL's action in colcoting appollant to go to school without first even maring a publiminary investigation to datermine his Sitness, was not only haphazard and immational, but ambitrary and obprishous and a weste of Covernment funds, in view of the Coder dated ID November 1970, dealing with "Non-Assignment of unsatiofentory perconnel to developmental techning elecces."

On cross-examination, appellant (p. 91) testified as follows:

- "Q. Do you remember your representative examining Mr. Ricardo?
- A. Yes.
- Q. Do you over remember your representative over asking Mr. Ricerco about this hardship problem?
- A. No, I didn't know that this sould be brought up at the time. I wasn't aware that the hardships had anything to do with it."

Yet, the Appeals Examiner held that since the locus of compassionate reasons was not rained during the oral reply, etc., the allegation was colf-conving. This ruling was errencous. In this case, we were not dealing with an employee who was incompetent, intemperate or inefficient. Appellant was a voteran of two ware, the father of three children, and a CS-O who caticfesterily performed in that depasity. The heavens would not have collepsed or the egomy folded were appellant given a deformant or withdrawn from achool.

The witness MOTO, a CS-13, testified that GS-13's perform 31 and Grade 12 work (p. 70). The witness MINNARD also testified that GS-13's perform 9, 11 and 12 functions (p. 77). One observation is quite pertinent. In its heate

to advance Air Traffic Central Specialists to CS-11, CS-12 and GS-13 positions, the agency will within the immediate future have an overabundance and a cumplus of personnel in those high-ranking positions. They will be overstacked like planes backing up in zero visibility. Met only will the 12's and 13's be performing the functions of 9's and 11's, but a reduction-in-force will incultably red it. The handwriting is on the well and unless this unfair, illegal and inequitable policy is corrected, the COMMISSION in the not-too-distant future will be confronted with a plethors of Priff" appeals.

that appellant herein did not cathefacterily perform his functions and duties as a CDADE 9. Appellant neither filed for nor sought premotion to Crade 11. He had no choice.

Ascording to the policy of the agency it was "do or die."

There is no statutory constion for a removal under those elecumetaness. The FAA does not have the power to legislate.

Until such time as Congress appropriately modifies or changes existing law the action of the agency herein was illegal as a matter of law, and in excess of its statutory authority, jurisdiction and limitations.

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Additionally, in summarily dismissing appellant, the agency was guided by its local facility standards. Those standards were not paramount but analliary to the agency's national standards (BAR decision in CHORGE W. WALEMTING, dated April 30, 1975).

CONCLUSION

THE ADVERSE DETERMINATION MADE BY THE RECIONAL DIRECTOR MAST BE REVERSED. CONTESTED ACTION IN APPELLANT REINSTATED TO HES CO-9 DOCUMEN.

DATED: Now York, June 3, 1973.

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Respectively submitted,

EALETA TECHTOOFF, Edq.
Abtooney for Appellant.

90a Schedule "E", Annexed to Complaint. BOARD OF APPEALS AND REVIEW UNITED STATES CIVIL SERVICE COMMISSION WASHINGTON, D. C., 20415 In the Matter of the Appeal of WARREN C. McDOWELL, Appellant. PRELIMINARY STATEMENT Appellant, an honoraby discharged Vietnam War veteran and a tenured competitive civil service employee occupying a position in the classified civil service, appeals from a determination dated May 1, 1973, by Appeals Examiner BERT GANZER for the Regional Director, New York Region, sustaining the action of the New York Federal Aviation Administration, which dismissed him from his position of AIR TRAFFIC CONTROL SPECIALIST, GS-215-2-11, effective September 22, 1972. The appeal before the Regional Director came on before Appeals Examiner SIDNEY M. SITVER on February 7, 1973. At the request of the agency and over objection, the hearing was reopened on March 1, 1973. Although appellant is an honorably discharged veteran, he was not given a hearing at the agency level prior to termination.

THE FACTS

Appellant commenced employment with FAA as an

Air Traffic Control Specialist, GS-6, on or about October 28, 1968 (p. 116). Upon completion of his probationary period, he was promoted to Air Traffic Control Specialist, GS-7, on December 15, 1968 (p. 116). On May 4, 1969, appellant was promoted to a GS-9 position. Thereafter, and on October 18, 1970, appellant was promoted to Air Traffic Control Specialist, GS-11 (p. 117). No evidence was introduced to impugn the quality or quantity of appellant's performance. It was conceded that as a GS-11, appellant's work performance was satisfactory.

By letter dated 2 August 1972, the Facility
Chief advised appellant that he proposed to remove him from
his position, etc., because of his "failure to satisfactorily
complete upgrade training requirements for the position of
Radar Controller/Limited Developmental." By letter dated
20 September 1972, the Facility Chief informed appellant of
his dismissal effective 22 September 1972, because of his
failure to satisfactorily complete upgrade training requirements for the position of Controller/Limited Developmental.
Significantly, "RADAR" was omitted although it was referred
to in the notice of proposed removal.

In this connection, appellant testified as fellows: (p.118):

"Q. Now did there come a time for any long period of time, that you were taken away from radar?

92a Schedule "E". A. Yes sir. Q. For how long a period of time? A. Approximately 6 months. Q. And could you tell us when that was? Well my training terminated on 6 August, 1971 and did not start again until the 25th of February, 1972". Appellant resumed a four week training extension on January 28, 1972 which ended on February 25, 1972 (p.120). THE ISSUES There are a number of issues involved in this appeal. Primarily, they may be divided in two categories: 1) Was the summary termination of appellant legal and consistent with decisional law? If the agency violated appellant's . procedural rights, then its action was clearly illegal, in that it denied to appellant procedural due process and the equal protection of the laws. In connection therewith, should the BOARD OF APPEALS AND REVIEW sustain this contention, then, of course, it would be unnecessary to consider and review the other objections being raised herein. 2) Without waiving the efficacy of our contention that everything done by the agency was illegal as a matter of law, appellant further -393a

Schedule "E".

contends that the action of the agency in summarily dismissing him was in excess of its statutory authority, jurisdiction and limitations; that his removal was discriminatory, arbitrary, capricious and unreasonable, and that the agency failed to demonstrate that appellant did not qualify for promotion under the agency's national standards.

These contentions will be discussed seriatim.

POINT I.

THE ACTION OF THE AGENCY IN SUMMARILY TERMINATING APPELLANT WITHOUT GIVING HIM A HEARING PRIOR TO TERMINATION, WAS ILLEGAL, THEROPER AND CONTRARY TO DECISIONAL LAW.

It is basic, fundamental and axiomatic that the Courts will not sanction an administrative action which denied the employee an opportunity of being heard before the drastic penalty of dismissal was imposed.

Appellant's right to continued employment could not be constitutionally withheld. He had more than a mere subjective "expectancy". He enjoyed "a property interest in continued employment" (PERRY v. SINDERMAN 408 U.S. 593, and BOARD OF REGENTS v. ROTH, 408 U.S. 564, decided June 29, 1972).

Appellant, a veteran, was a career employee occupying a competitive civil service position. As a tenured

employee he could not be removed without a hearing. In the cases of PERRY v. SINDERMAN and BOARD OF REGENTS v. ROTH.

supra, the Supreme Court held that employment was a "property right" which could not be summarily dissipated without a hearing. In KENNEDY v. SANCHEZ, decided October 24, 1972, by a three-Judge Statutory Court in the Northern District of Illinois, Judge McLAREN writing unanimously for the Court, held that any rule, regulation or statute which terminated the employment of a non-probationary Federal employee in the competitive civil service without a full evidentiary hearing prior to termination was a violation of the Fifth Amendment of the United States Constitution. In PITZOERALD v. HAMPTON, 329 F. Supp. 997, the Court also held that a Federal civilian employee was entitled to a hearing.

The above decisions are binding on the BOARD OF APPEALS AND REVIEW. The decisions by the SUPREME COURT OF THE UNITED STATES in ROTH and SINDERMAN, supra, are final. There is no further avenue of appeal from said decisions.

Since the decisions in KENNEDY v. SANCHEZ and FITZGERALD v. HAMPTON were not stayed, they must be followed by this BOARD.

As a veteran and a permanent employee, appellant acquired tenure and a property right to his position which included continuity of employment. The right to continuity of employment was and is a constitutionally protected property right. In GOLDBERG v. KELLY, 397 U.S. 254, the

Supreme Court of the United States held that the "rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scruliny."

In the notice of proposed removal dated 2 August 1972, the Facility Chief stated "This is notice that I propose to remove you from your position as Air Traffic Control Specialist (Center) 3S-2152-11, *****. On the third page of said notice, the statement also appeared "Full consideration will be given to any reply you submit." There was nothing to indicate in said notice that the penalty would be a demotion in grade, suspension, or a reprimand.

charging letter decided to dismiss appellant even before any reply was submitted by him. The action of the agency in permitting appellant an opportunity to submit his reply was merely a token compliance with the statute and was merely a form preceding a predetermined removal. The agency had adopted a "policy" of dismissing all of its tenured employees who sould not pass the agency's standards for promotion (national standards have been ignored).

A similar situation arose in the case of

HORMAN PIRKELSTEIN who was employed as a Motion Picture Film

Cleaning Machine Operator, WB-3, ARMY PICTORIAL CENTER. On

February 14, 1962, hawar served with a letter of charges

which advised him that "it is proposed to effect your

removal effective March 20, 1962, for lack of dependability,

with the Regional Director, Second U. S. Civil Service Region. A hearing was held on June 6, 1962. On July 10, 1962, the Regional Director sustained the dismissal. An appeal was taken to the BOARD OF APPEALS AND REVIEW. By letter dated October 11, 1962, the BOARD OF APPEALS AND REVIEW in annulling the dismissal, held:

"The net effect was that the employes was denied any advance notice before the decision was made and was foreclosed of any effective action on his part to escape the removal action. This was fatal procedural error."

Pursuant to the decision of the BOARD OF APPEALS AND REVIEW, Mr. FINKELSTEIN was reinstated.

The action of the agency in failing to give appellant herein a full evidentiary hearing prior to termination deprived him of his constitutional rights to procedural due process and the equal protection of the laws.

Under the circumstances, corrective action must be taken and an order should issue directing appellant's reinstatement.

POINT II.

THE ACTION OF THE AGENCY IN TERMINATING APPELLANT BESIDES BEING ILLEGAL AND IMPROPER, WAS IN EXCESS OF ITS STATUTORY AUTHORITY, JURISDICTION AND LIMITATIONS, AND WAS ARBITRARY, CAPKICIOUS, DISCRIMINATORY AND UNREASONABLE. MOREOVER, THE AGENCY FAILED TO PLEAD AND PROVE THAT APPELLANT PAILED TO QUALIFY FOR PROMOTION UNDER NATIONAL STANDARDS AND NOT LOCAL FACILITY STANDARDS.

It is conceded that every government agency has the right to promulgate rules and regulations. However, the rules so established may not contravene basic statutes. This is particularly true in the area of separation and removal where uniformity, equality, certainty and security are so essential if civil service efficiency and morale are sta be maintained. The Civil Service provisions are intended as a protection for all employees in the civil service. The purpose of civil service is to protect the diligent. constitutious and competent employes. All of the statutes, rules and regulations pertaining to civil service are an attempt by Congress to hold agencies and heads of departments to a standard of social justice in their dealings with sompetitive civil service employees. The statutes, etc., are to be interpreted with a degree of liberality essential to the attainment of that end in view. This principle is imbedded in public policy and may not be uprooted by any separe or plan or even a well-intentioned denial.

Appellant is of course entitled to challenge the dismissal determination as based upon errors of law and

entails a judicial review of the administrative decisions to determine whether it was based upon substantial evidence and free from errors of law, fraud, bad faith and arbitrary action (UNITED STATES v. CARL) BIANCHI & CO., 373 U.S. 709, and KOPPERS CO. v. U.S., 105 Ct. Cl. 142, 405 F. 2d 554).

Appellant was promoted to his GS-11 position on October 18, 1970. In the notice of proposed removal, it was claimed that appellant attended the Radar Training class from 5 April 1971 to 30 April 1971. At the hearing however, the agency witness testified the course ran from April 5, 1971 till August 6, 1971 (p. 55).

that appellant was required to pass 2. Out of 3 check rides and 3 sectors which "would have meant 6 check rides", and that appellant "only took 1 check ride and that was on August 11, 1971". The record is absolutely barren of any evidence to establish the agency's national standards for promotion. In this connection, N3120.27 promulgated by the Faderal Aviation Administration dated 13 July 1971, requires the candidate to pass two sectors not three. The national notice provides:

"Qualified to perform controller duties on two radar positions".

The evidence adduced at the hearing abundantly

promotion were made on a haphazard basis, and that the employee could be selected the day following his promotion to a higher grade (pp. 51, 53). This arbitrary selection is neither persuasive nor sound. The Evaluation Proficiency Developmental Officer did not discuss with the Team Supervisor appellant's potential at the time. Since appellant had been in grade as small only several months, the action of the official in designating him to go to school without even a discussion with his Team Supervisor as to appellant's fitness at that time, clearly betokens the arbitrary and irrational manner in which the official made the selection.

Mr. ROSSI, a GS-13, testified appellant was not "ready for On The Job Training" (p.88), and that appellant should have had more experience and training (p. 89).

Mr. DIMARTINO, a GS-13, testified that appellant would not check out; that appellant entered the program prematurely, and was "not ready to enter into this radar training program at that time" (pp. 97-100). Mr. SHOMILAK, a GS-13, testified appellant was not ready for checkout (pp. 109-110), and that appellant "was not ready to go into the program" (p. 114). Significantly, the witness ROSSI also testified that an Air Traffic Controller GS-11 worked alongside of a Radar Controller, GS-12 and assisted the Radar Controller (pp.91-92). Yet, the agency witness Mr. DeLUGA admitted that appellant was not permitted to work on radar from October 16

100a

Schedule "E".

1971 until February 25, 1972 (p.58). In this connection, appellant testified he was taken away from radar for 6 months (p. 118). Under the circumstances, it is obvious that appellant was denied a full and a fair training period.

On Page 4 of his decision, the Appeals Examiner commented on the "better" position offered appellant at Messins, and stated appellant did not become medically qualified "until shortly before" the effective date of his termination. The reassignment was to a 7 position. The temporary disqualification was removed on September 20,1972 (Exhibit #10). The letter of dismissal was dated September 20, 1972. On July 17, 1972, a compensation claim was filed. The agency was on notice. Appellant testified he never refused the 7 position (p.122). Mr. SMIPMAN, the Personnel Officer, testified he had a conversation with appellant on July 17, 1972 (p. 4) and

"A. I believe the next day he came back and he said he would take the position, but he could not go to Oklahoma City. He didn't think he would be able to go to Oklahoma City, because of some medical problem".

7: --

Since appellant was laboring under a temporary medical disqualification, his refusal was justifiable. Under the circumstances, his rights to reassignment as a preference eligible were violated by the agency. In this connection, Mr. SHIPMAN the Personnel Officer testified that if the agency knew appellant was sick they would not send him to school (p.11). The fact is that the agency knew (p. 12).

101a

Schedule "E".

At the hearing before the Regional Director, appellant was denied his fundamental right of confrontation and cross-examination. It was incumbent upon the agency to produce the individuals who acted as Instructors and make them available for cross-examination. Appellant challenged their qualifications and expertise. These so-called Instructors were never made available by the agency for cross-examination.

Upon what basis did Mr. LUNELL select the Instructors? What special knowledge or expertise did they possess which qualified them to teach, examine and evaluate? Were they acting out-of-title? Were they in fact qualified? Appellant had the right to explore those issues.

The failure therefore, on the part of the agency to produce the Instructors at the hearing and make them available for cross-examination, denied to appellant procedural due process and the equal protection of the laws.

Esther appellant nor his representative could cross-examine a written report.

One observation is quite pertinent. In its haste to advance Air Traffic Control Specialists to GS-12 and GS-13 positions, the agency will within the immediate future have an overabundance and a surplus of personnel in these high-ranking positions. They will be overstacked like planes backing up in zero visibility. Not only will

the 12's and 13's be performing the functions of 9's and 11's, but a reduction-in-force will inevitably result. The handwriting is on the wall and unless this unfair, illegal and inequitable policy is corrected, the Commission in the not-too-distant future will be confronted with a plethora of "riff" appeals.

In his decision (p.4) Appeals Examiner
BERT GANZER (who did not conduct the hearing) stated:

"ass appellant.....failed to pass the required 'checkouts', or acquire sufficient proficiency".

The Appeals Examiner was in error. Appellant was given only one checkout. Even this is contrary to national standards. The alleged failure to pass one checkout did not ipso facto disqualify appellant. The Appeals Examiner was also in error in referring to New York Center Orders 3120.1 dated March 16, 1970, 3120.112, dated January 19, 1971, and the requirements contained in New York Center Training Task Force Report, dated November 10, 1969. These sections were obsolete and not in use at the time appellant was in training. The agency's national standards N3120.27 dated 13 July 1971 were applicable. This directive provides:

"Training time shall be considered only as the time in which the individual is undergoing training. Those positions not under direct supervision shall not be included as training time".

The directive is crystal clear. Yet, the agency failed to

follow the national directive. It counted the days appellant was out sick and the times he was placed in position as a manual controller towards training time. It failed to differentiate between training under supervision and normal work tasks. It also failed to exclude sickness.

Furthermore, appellant's training should have continued in sectors 9 and 10. The witness SHOMILAN testified that the traffic in sectors 11 and 12 were different and that appellant was under a handicap because he had "very little training at sectors 11 and 12 in his previous training period" (p. 108). The training department followed the wrong directive.

charge) that appellant herein did not satisfactorily perferm his functions and duties as a GRADE 11. The charge herein (which is seriously challenged by appellant) is that appellant failed to pass one checkout. Appellant neither filed for nor sought promotion to Grade 12. He had no choice. According to the policy of the agency it was "do or die." There is no statutory sanction for a removal under those circumstances. The FAA does not have the power to legislate. Until such time as Congress appropriately modifies or changes existing law, the action of the agency herein was illegal as a matter of law, and in excess of its statutory authority, jurisdiction and limitations.

104a Schedule "E". Additionally, in summarily dismissing appellant, the agency was guided by its local facility standards. Those standards were not paramount but ancillary to the agency's national standards (DAR decision in GEORGE W. VALENTINE, dated April 30, 1973). QONTESSION THE ADVERSE DETERMINITION MADE BY THE REGIONAL DIRECTOR MUST BE REVERSED. COPRECTIVE ACTION IS REQUIRED. THE DISMISSAL MADULD BE RESCINDED AND APPELLANT REINSTATED TO HIS GS-11 POSITION. DATED: New York, May 24, 1973. Respectfully submitted, SAMUEL RESNICOFF, Esq., Attorney for Appellant. -15Answer.

JDP:CMV:sm File No. 740338 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. McDOWELL,

Plaintiffs,

- against -

A N S W E R Civil Action No. 74 C 458

RCBERT E. HAMPTON, Chairman,
JAYNE B. SPAIN and L. J.
ANDOLSEK, Commissioners,
constituting the UNITED STATES
CIVIL SERVICE COMMISSION,
BILLIE H. VINCENT, Facility
Chief, New York Center; GERALD
SHIPMAN, Personnel Officer, New
York Center, LOUIS C. POL
(Acting) Facility Chief, FAA,
New York Center, DEPARTMENT OF
TRANSPORTATION, FEDERAL AVIATION
ADMINISTRATION, Eastern Region,
Federal Building, Jamaica,
New York,

Defendants.

Defendants, as and for their answer, allege as follows:

- 1. Admit the allegations contained in the paragraphs of the complaint designated "(2)," "(5)," "(6)," "(8)," "(9)," "(11)," "(12)," "(13)," "(18)," "(19)," "(21)," "(22)," "(24)," "(25)," "(26)," "(31)," "(32)," "(34)," "(35)," "(37)," "(38)," "(39)," "(44)," "(45)," "(47)," "(48)," "(50)," "(51)," "(57)," "(53)," "(60)," "(61)," "(63)," "(64)," "(65)," "(66)," and "(76)."
- 2. Admit the allegations contained in the paragraph designated "(1)" except deny that the Department of Transportation and the Federal Aviation Agency are proper defendants in this action.

106a

Answer.

- 3. Admit the allegations contained in the paragraphs designated "(7)," "(20)," "(33)," "(46)," and "(59)" except deny all the allegations contained in the last sentence of each such paragraph.
- 4. Admit the allegations contained in the paragraph designated "(52)" and state that the decision was affirmed on August 21, 1973.
- 5. With respect to the paragraph designated "(3)," admit the allegations contained in the first sentence thereof, except deny that the Department of Transportation or the Federal Aviation Administration are proper defendants herein. With respect to the second sentence thereof, admit that this action seeks a declaratory judgment and a writ of mandamus directing reinstatement together with back pay. With respect to the third sentence thereof, admit that plaintiffs make the allegations stated therein but deny said allegations.

With respect to the allegations under the heading "Jurisdiction," deny that jurisdiction over this action is conferred upon this Court by any of the statutes cited therein or by the 14th Amendment to the Constitution of the United States or Rule 57 of the Federal Rules of Civil Procedure.

6. With respect to the paragraph designated "(4)," deny that the provisions cited therein provide a jurisdictional basis for this action.

- 7. With respect to the allegations contained in the paragraph designated "(10)," admit that plaintiff
 Haje's appeal to the Regional Office of the Civil Service
 Commission was timely and that during the hearing afforded him as a part of the aforesaid appeal, plaintiff Haje's representative made contentions that are substantially in accordance with those contained in the first and third clauses of the second sentence of paragraph "(10)", and that he also contended that some of the plaintiffs training instructors may not have been qualified. Defendants deny the remaining allegations of paragraph "(10)."
- 8. With respect to the allegations contained in the paragraph designated "(23)," admit that plaintiff Bevilacque's appeal to the Regional Office was timely and that during the hearing afforded him as a part of the aforesaid appeal, the plaintiff's representative made contentions that are substantially in accordance with those contained in the first, second and third clauses of the second sentence of paragraph "(23)", and that he also contended that it was incumbent on the agency to produce the instructors and thereby subject them to confrontation and cross-examination and to make the plaintiff some kind of job off prior to effecting his removal. Defendants deny the remaining allegations of paragraph "(23)."
- 9. With respect to the paragraph designated "(36)," admit that plaintiff Resler's appeal to the Regional Office of the Civil Service Commission was timely and that during the hearing afforded him as a part of the

aforesaid appeal, the plaintiff's representative made contentions that are substantially in accordance with those contained in the first and second clauses of the second sentence of paragraph "(36)," and that he also contended that no attempt was made to reassign the plaintiff and that it was incumbent on the agency, as part of its burden of proof, to produce the instructors and thereby subject them to confrontation and cross-examination. Defendants deny the remaining allegations contained in paragraph "(36)."

- "(49)," admit that plaintiff Shannon's appeal to the Regional Office of the Civil Service Commission was timely and that during the hearing afforded him incident to the aforesaid appeal, plaintiff's representative made contentions that are substantially in accordance with those contained in the first and third clauses of the second sentence of paragraph "(49)" and that he also contended that it was incumbent on the agency as part of its burden of proof to produce the instructors and thereby subject them to confrontation and cross-examination.

 Defendants deny the remaining allegations contained in paragraph "(49)."
- ll. With respect to the paragraph designated
 "(62)" admit that plaintiff McDowell's appeal to the
 Regional Office of the Civil Service Commission was timely
 and that during the hearing afforded him as part of the

aforesaid appeal, plaintiff's representative made contentions that are substantially in accordance with those contained in the first and third clauses of the second sentence of paragraph "(62)" and that he also contended that it was incumbent on the agency to find something (a position) for the plaintiff and not to summarily separate the plaintiff. Defendants deny the remaining allegations of paragraph "(62)."

- 12. Deny the paragraphs designated "(14),"
- "(15)," "(16)," "(17)," "(27)," "(28)," "(29)," "(30),"
- "(40)," "(41)," "(42)," "(43)," "(53)," "(54)," "(55),"
- "(56)," "(67)," "(68)," "(69)," "(70)," "(77)" and "(78)."
 - 13. With respect to the paragraphs following the heading BASIS FOR RELIEF, designated "(71)," "(72)," "(73)," "(74)," and "(75)," deny that they set forth any jurisdictional basis for the maintenance of this action.

FIRST AFFIRMATIVE DEFENSE

14. The action of defendant BILLIE H. VINCENT in removing plaintiffs from their employment with the Federal Aviation Administration and the decision of the members of the Civil Service Commission affirming that action were not arbitrary or capricious or an abuse of discretion but were made in accordance with all applicable procedures and statutory requirements and are supported by substantial evidence.

SECOND AFFIRMATIVE DEFENSE

back pay from the times of plaintiffs' dismissals, this Court lacks jurisdiction of the subject matter of this action for the reasons that (i) said claim for back pay is actually a claim for an award of money against the UNITED STATES OF AMERICA but the UNITED STATES OF AMERICA, although the real party in interest and an indispensable party, is not a party to and has not been served in this action, and (ii) were this an action for back pay against the UNITED STATES OF AMERICA, jurisdiction would lie exclusively in the Court of Claims because the amounts demanded exceeds \$10,000.

THIRD AFFIRMATIVE DEFENSE

16. This action should be dismissed for lack of jurisdiction over the subject matter.

FOURTH AFFIRMATIVE DEFENSE

17. This action should be dismissed for failure to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE

judgment and damages in tort, the complaint fails to state a claim upon which relief can be granted as against defendant GERALD SHIPMAN for reasons that the complaint makes no allegations of fact regarding defendant SHIPMAN whatever and he is not alleged to have performed any act in connection with plaintiffs' discharge

Answer.

WHEREFORE, defendants demand judgment dismissing plaintiffs complaint and awarding to defendants their cost and disbursements in this action, and such other and further relief as to the Court may seem just and proper.

Dated: Brooklyn, New York August 28, 1974

> DAVID G. TRAGER United States Attorney Eastern District of New York Attorney for Defendants

By:

CONSTANCE M. VECELLIO
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

Plaintiff's Notice of Motion Dated December 20, 1974 For Summary Judgment and Affidavit of Warren C. McDowell in Support Thereof.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. McDOWELL.

Plaintiffs.

- against -

ROBERT E. HAMPTON, Chairman, JAYNE B.
SPAIN and L. J. ANDOLSEK, Commissioners,
constituting the UNITED STATES CIVIL
SERVICE COMMISSION, BILLIE H. VINCENT,
Pacility Chief, New York Center; GERALD
SHIPMAN, Personnel Officer, New York Center,
LOUIS C. POL (Acting) Facility Chief, FAA,
New York Center, DEPARTMENT OF TRANSPORTATION,
PEDERAL AVIATION ADMINISTRATION, Eastern
Region, Federal Building, Jamaica, New York,

Defendants.

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of WARREN C. McDOWELL, duly sworn to the 20th day of December, 1974, the summons and complaint, answer, and upon all of the filed papers and precedings heretofore had herein, the undersigned will move this Court at the Motion Part, 225 Washington Street, Brooklyn, New York, on the 16th day of January, 1975, before United States District Judge MARK A. CONSTANTINO, Court Room #1, at 10:00 A.M., or as soon thereafter as counsel can be heard; for summary judgment in favor of plaintiffs upon the ground that there is no defense to this action and that the Court grant judgment to plaintiffs as a matter of law, and for such other, further and

113a Plaintiff's Notice of Motion. different relief as to the Court may seem just and proper in the premises. DATED: New York, December 20, 1974. Atterney for Plain Office & P. O. Address 280 Broadway New York, N.Y. 10007 DIgby 9-3896 TO:-DAVID G. TRAGER, Esq. United States Attorney Attorney for Defendants 225 Cudman Plaza East Brooklyn, New York 11201

UNITED STATES DISTRICT COURT-EASTERN DISTRICT OF NEW YORK

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and MARREN C. McDGWELL,

Plaintiffs.

- against -

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L. J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, et al., etc.,

Defendants.

STATE OF NEW YORK)
CITY OF NEW YORK) \$5.:
COUNTY OF NEW YORK)

WARREN C. McDOWELL, being duly sworn, deposes and says:

- 1. I am one of the plaintiffs in the above-entitled action and submit this affidavit in support of the instant application for summary judgment.
- 2. I am an honorably discharged veteran of the Vietnam War. Plaintiff SHANNON is an honorably discharged veteran of World War II and the Korean War. Plaintiff RESLER is an honorably discharged veteran with more than twenty-three years of military service. Plaintiff HAJE is an honorably discharged Navy veteran of the Korean War. Plaintiff BEVILACQUE is a tenured competitive ivil service employee who occupied a competitive civil service employee who occupied a competitive civil service
- 3. This is a consolidated action by five plaintiffs to vacate and set aside their dismissals from the Foderal Aviation

Affidavit of Warren C. McDowell.

leadings concede (per. 19) that plaintiff BEVILACQUE's work
exformance as a Grade 9 was satisfactory.

- 9. All of the plaintiffs received written notices from the agency that it was proposed to remove them from their permanent esitions because of their failure to satisfactorily complete pgrade training requirements for the next higher position.

 There were given an opportunity to submit written replies. There were some interviews and conferences after the ismissal at the agency levels.
- 10. All of the plaintiffs were dismissed not because of inability to satisfactorily perform the functions and duties of the position which they permanently occupied, but allegedly upon the ground that they failed to properly answer oral questions which were posed to them by so-called Instructors designated by the agency interrogate them for the purpose of ascertaining familiarity with the duties of the higher position.
- Il. After their dismissal and prior to the hearing before the New York Regional Director, all of the plaintiffs requested that the Instructors be produced as witnesses for purposes of confrontation and cross-examination to determine their expertise is Instructors. Both the Regional Director of the Civil Service commission and the operating officials of the agency failed and refused to make said Instructors available as witnesses. Similarly, laintiffs' requests for other agency employees to be produced as witnesses at the hearing were not complied with.

12. At the hearing before said Regional Director, it was conceded that each of the plaintiffs had satisfactorily performed all of the functions and duties of the position which they held at the time of their removal. Plaintiffs were not charged with incompetency, misconduct, insubordination, latenesses or for any violation of the Rules and Regulations of the agency. Plaintiffs contended since the proposed removal was not predicated upon any disciplinary action that the dismissal was illegal as a matter of law. Nevertheless, the Regional Director sustained the dismissal determinations.

Appeals and Review, United States Civil Service Commission,
Washington, D. C. There was no hearing before the Board of Appeals
and Review. However, a memorandum of law (Schedules "A", "B", "C",
"D" and "E" annexed to complaint) was submitted on behalf of each
of the plaintiffs. The Board of Appeals and Review affirmed the
decisions of the Commission's New York Regional office and held
that the action of the agency was neither arbitrary nor capricious
in dismissing plaintiffs because of failure "to meet the requirements for or to accept promotion to the next higher non-supervisory
grade level." The Board of Appeals further held:

"That the method by which employees were selected to instruct and evaluate the appellant is not germane to the issue of whether the evaluations made by those employees of the appellant were correct."

This, of course, was erroneous and highly prejudicial. We challenged the expertise of these alleged so-called Instructors to rate, grade and evaluate our qualifications for promotion.

At the hearing, it was our intention to ascertain the method and the manner by which said Instructors were selected; the basis for their selection; their qualifications; background; experience, and their ability to pose the question problems which they presented to each of the plaintiffs at the time of the eral examination. If the Instructors chosen by the operating officials of the agency were in fact not qualified to rate and evaluate our qualifications, then it was an arbitrary and erroneous designation. Furthermore, a period of probation in the next higher grade would have afferded the operating officials of the agency ample opportunity to determine whether plaintiffs qualified for the next higher fittle.

BEVILACQUE were honorably discharged veterans occupying a competitive position. Plaintiff BEVILACQUE was a career employee who occupied a competitive position in the classified civil service. All of the plaintiffs could only be removed for misconduct or incompetency in the performance of their duties upon stated charges and upon a hearing, and only for such cause as would promote the efficiency of the service. It was and is our contention that our dismissal was illegal as a matter of law because the civil service statutes dealing with Government Organization and Employees (TITLE 5, U.S.C.) did not justify dismissal of a tenured civil service employee because of alleged inability to demonstrate satisfactory performance of the duties of the next higher position at the time the oral examination was conducted by the Instructors.

15. While there is a question of fact as to the expertise of the employees (Instructors) who rated and evaluated our qualifications to perform the duties of the next higher position, the prime issues are strictly legal. Initially, we maintain that the alleged inability to perform the duties of the next higher position is not per se a basis for diamissal. Secondly, all of the plaintiffs with the exception of BEVILACUUE who was not a veteran, could not be dismissed without a hearing. Thirdly, we maintain that the New York Regional Director did not give plaintiffs a full and a fair hearing because our requests for the production of certain agency employees including the Instructors as witnesses were denied. Finally, we maintain that upon the entire record the operating officials did not sustain their burden of proving that the removal of plaintiffs who were satisfactorily performing all the duties of their positions would promote the efficiency of the service.

wherefore, it is respectfully requested that summary judgment be granted in favor of plaintiffs. There is no genuine defense to this action.

/e/ WARREN C. McDCWELL

Sworn to before me this

200 day of December 1974.

ORETA LA PAYINI
NOTARY PUBLIC, STATE OF NEW YORK
NO. 24 74 29 450 Qual in Kings Co.
Certificate, filed in New York County
Control of Experiment 1987

Defendants Notice of Motion Dated February 6, 1975 For Summary Judjment Pursuant to Rule 56.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. McDOWELL,

Plaintiffs,

- against -

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L. J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center; GERALD SHIPMAN, Personnel Officer, New York Center; LOUIS C. POL (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York,

Defendants.

SIR:

PLEASE TAKE NOTICE that the defendants will move this Court at Courtroom 1, Second Floor, United States Courthouse 225 Cadman Plaza East, Brooklyn, New York, on Thursday, the 20th day of February 1975, at 10:00 h.H., or as soon thereafter as counsel can be heard, before the Honorable Mark A. Costantino, United States District Judge, for an Order pursuant to Rule 56 of the Fateral Rules of Civil Procedure

Civil Action No. 74 C 458

HOTICE OF MOTION FOR SUMMARY JUDGMENT Defendants Notice of Motion.

for summary judgment dismissing the plaintiffs' complaint, and for such other and further relief as the Court may consider just and proper.

Dated: Brooklyn, New York February 6, 1975

Yours, etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

Constance M. Vecellio
Assistant U.S. Attorney

TO:

Samuel Resnicoff, Esq. 280 Broadway New York, New York 10007 Defendants Notice of Motion Dated April 29, 1975 For Judgment on the Pleadings Dismissing the Complaint Pursuant to 12(c) of the Federal Rules of Civil Procedure.

CIS: CMV: 1q F. #740338 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ARNOLD HAJE, THOMAS HEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. McDOWELL,

Plaintiffs,

-against-

ROBERT E. HAMPTON, Chairman, JAYNE
B. SPAIN and L. J. ANDOLSEK, Commissioners, constituting the UNITED
STATES CIVIL SERVICE COMMISSION,
BILLIE H. VINCENT, Facility Chief,
New York Center; GERALD SHIPMAN,
Personnel Officer, New York Center;
LOUIS C. POL (Acting) Facility
Chief, FAA, New York Center,
DEPARTMENT OF TRANSPORTATION, FEDERAL
AVIATION ADMINISTRATION, Eastern
Region, Federal Building, Jamaica,
New York,

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

Civil Action No. 74 C 458

Defendants.

SIRI

this Court at Courtroom 1, Second Ploor, United States
Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on
Thursday, the 29th day of May 1975, at 10:00 A.M., or as
soon thereafter as counsel can be heard, before the
Honorable Mark A. Costantino, United States District Judge,
for an Order pursuant to 12(c) of the Federal Rules of
Civil Procedure for judgment on the pleadings dismissing the

Defendants Notice of Motion.

plaintiffs' complaint and for such other and further relief as the Court may consider just and proper.

Dated: Brooklyn, New York

April 29, 1975

TO: Samuel Resricoff, Esq. Attorney for Plaintiffs 280 Broadway New York, New York 10007 DAVID G. TRAGER United States Attorney Eastern District of New York Attorney for Defendants 225 Cadman Plana East Brooklyn, New York 11201

CONSTANCE M. VECELLIO
Assistant U.S. Attorney

Memorandum Decision by Costantino, J., and Judgment Appealed From.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. McDOWELL,

Plaintiffs,

74-C-458

v.

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L.J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center, GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS C. POL, (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York, and the UNITED STATES OF AMERICA,

MEMORANDUM and ORDER

JUN 1 1976

Defendants.

COSTANTINO, D.J.

This case is before this court on cross-motions for summary judgment pursuant to Rule 56 Fed.R.Civ.P. Since there are no genuine issues as to material facts this case may be disposed of by means of summary judgment.

The following facts are not in dispute. Plaintiffs are former non-probationary employees of the Federal Aviation

Memorandum Decision.

Administration [hereinafter FAA] who were dismissed from the federal civil service and from their air traffic controller positions solely because they failed to qualify for promotion to the next higher position. The decision to dismiss plaintiffs was made after they had failed to achieve satisfactory scores on oral qualifying tests given by FAA instructors.

This court has jurisdiction of the action under 1 \$2\$ 5 U.S.C. § 702/ and 28 U.S.C. § 1361./

The critical question posed by these motions is whether or not the FAA may dismiss non-probationary employees based solely upon a failure to qualify for promotion.

Dismissal of a non-probationary federal employee is authorized only if it is for "such cause as will promote the efficiency of the service." 5 U.S.C. § 7512. In Sullivan v. United States, 416 F.2d 1277 (Ct. Cl. 1969), the Court of Claims

Cf. Rusk v. Cort, 369 U.S. 367 (1962); Toilet Goods Assoc. v. Gardner, 360 F.2d 677, aff'd 387 U.S. 152 (1967).

See <u>U.S. ex rel. Schonbrun v. Community Offices</u>, 403 F.2d 371 (2d Cir. 1968), <u>cert. denied</u>, 394 U.S. 929 (1969).

Memorandum Decision.

unanimously concluded that, in view of the peculiar circumstances of FAA employment, dismissal for failure to meet "upgrade" training requirements was proper. In so holding, the court emphasized that the FAA, as the only civilian employer of air traffic controllers, had to rely almost entirely upon its own training program to meet its controller needs. The court distinguished between two types of employees: (1) those who have been employed in order to learn, and (2) those who have learned in order to be employed. 416 F.2d at 1277. The first class could be dismissed for failure to complete "up-grade" requirements; the latter class could not be dismissed for that reason.

A review of the record in this case convinces this court that plaintiffs here were members of the first class. The description and position classification standard for controllers at plaintiffs' level make clear that the positions are training positions. According to the job description: "Incumbents . . . who fail to meet requirements for . . . promotion to the next higher . . . level may be reassigned, demoted or separated from employment." The fact that plaintiffs may have performed some useful tasks is in no way inconsistent with the conclusion that the

127a

Memorandum Decision.

positions were trainee positions. See Sullivan supra at 1282.

Since plaintiffs were trainees this court concludes that their dismissal as air traffic controllers was not illegal. It is further concluded that plaintiffs' dismissal from the civil service itself was proper. "The remedy necessary to promote the efficiency of the civil service is a matter peculiarly and necessarily within the discretion of the Civil Service and cannot be disturbed on judicial review absent exceptional circumstances Bishop v. McKee, 400 F.2d 87, 88 (10th Cir. 1968). Plaintiffs have failed to set forth any facts which would show that there are exceptional circumstances; nor have they shown that the FAA's decision was arbitrary, capricious, erroneous or an abuse of discretion. See Charlton v. United States, 412 F.2d 390 (3d Cir. 1964); Jaeger v. Stephens, 346 F. Supp. 1217, 1221 (D. Colo. 1971); DAVIS, ADMINISTRATIVE LAW § 29.07 (1970 Supp.); Cf. McTiernan v. Gronowski, 337 F.2d 31 (2d Cir. 1964).

Due Process and Equal Protection

Plaintiffs claim that they were denied their rights to due process and equal protection (a) when they were denied a full trial-type hearing prior to termination, (b) when at

a post-termination hearing they did not have an opportunity to confront and cross-examine witnesses and (c) when they were tested orally by allegedly unqualified instructors.

Plaintiffs' arguments are without merit. Plaintiffs received all 5 U.S.C. § 7501 and § 7512 pre-termination hearings. These procedures were sufficient to protect 3 plaintiffs' property rights./ See Arnett v. Kennedy, 416 U.S. 134 (1974); Davis v. Vandiver, 494 F.2d 830 (5th Cir. 1974); Eley v. Morris, 390 F. Supp. 913 (N.D. Ga. 1975); Rolles v. Civil Service Commission, 512 F.2d 1319 (D.C. Cir. 1975).

Plaintiffs have waived their right to complain about failure to call and confront witnesses since they did not comply with the basic requirements of 5 CFR § 722.307

The fact that four of the plaintiffs in the case at bar are veterans does not affect this conclusion. Differing rights in adverse actions between veteran and non-veteran federal employees were abolished with the implementation in 1962 of section 14 of Executive Order No. 10988, 3 CFR 521, 527 (1959-63 Comp.), which extended to all competitive civil service employees, rights identical to those given to veterans under section 14 of the Veterans Preference Act of 1944 as amended (now 5 U.S.C. §§ 7511, 7512(a)(b) and 7701. This court has not been referred to any authority countermanding this executive order.

Memorandum Decision.

(1974). The regulation requires that the party himself attempt to arrange for the attendance of the witnesses.

Then, if necessary, it requires that he give proper and timely notice to the agency for production of witnesses it employs.

Williams v. Zuckert, 372 U.S. 756 (1963). Until compliance with this basic requirement, the plaintiffs cannot complain of any resulting loss of procedural rights. McTiernan v.

Gronowski, supra at 37. Although plaintiff Bevilacque did properly request one witness who did not appear, he waived any objection by stipulating as to what the witnesses's testimony would have been.

Plaintiffs final allegation is that they were denied due process because the up-grade tests were given orally by allegedly unqualified instructors. However, "[i]t is not the business of the courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directives of Congress,"

Air Line Pilots Association v. Quesada, 276 F.2d 892 (2d Cir. 1960); United States v. Professional Air Traffic Controllers

Organization, 438 F.2d 79 (2d Cir. 1970), cert. denied, 402

U.S. 915. The determination of how qualifications for promotion will be assessed is within the administrative

130a Memorandum Decision.

discretion of the FAA providing that it is shown that there is reasonable basis for the FAA decisions. There is substantial evidence in the record to indicate that the instructors were properly qualified. For example, they met the requirements of the National Enroute Training Program.

This court concludes that plaintiffs' dismissals were effectuated through proper procedures which accorded them due process. It is further concluded the factual determinations were based upon substantial evidence, that the FAA did not act arbitrarily or in abuse of its discretion, and that the dismissals were reasonably related to the promotion of the efficiency of the service.

Accordingly defendant's motion for summary judgment is granted; plaintiffs' cross motion is denied. The Clerk is directed to enter judgment in accordance with this opinion. So ordered.

Allali (S. D. J.

Judgment.



UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON, and WARREN C. McDOWELL,

Plaintiff,

- against -

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L.J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center, GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS POL, (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York, and the UNITED STATES OF AMERICA,

Defendants.

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

JUN 4 1976

TIME A.M.....

JUDGMENT

74 C.458

M.P. ED

A memorandum and order of Honorable

Mark A. Costantino, United States District Judge, having been

filed on June 2, 1976, granting defendants' motion for summary

judgment pursuant to Rule 56 Fed.R.Civ.P. and denying plaintiffs'

cross-motion and directing the Clerk to enter judgment for the

defendants and against the plaintiffs, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants and that the defendants' motion for summary judgment is granted.

Dated: Brooklyn, New York June // , 1976

Levis Orgel

Notice of Appeal.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. McDOWELL,

Plaintiffs.

v.

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L.J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center, GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS C. POL, (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York, and the UNITED STATES OF AMERICA,

NOTICE OF APPEAL

Civil Action
No. 74C-458

Defendants.

SIR:

PLEASE TAKE NOTICE that the plaintiffs hereby appeal to the United States Court of Appeals for the Second Circuit, from the order and judgment entered herein on the 4th day of June, 1976 in the office of the Clerk of the United States District Court for the Eastern District of New York which dismissed the complaint and granted judgment to defendants, and plaintiffs

133a Notice of Appeal.

appeal from each and every part of said order and judgment as well as from the whole thereof.

DATED: New York, N.Y., June 23, 1976

Yours, etc.,

SAM RESNICOFF and MURRAY . GORDON, P.C.

Attorneys for Plaintiffs
Office & P. O. Address
666 Third Avenue

New York, N.Y., 10017

TO:-

HON. DAVID G. TRAGER, Esq.
United States Attorney, Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

United States Court of Appeals for the Second Circuit

Arnold Haje, thomas Bevilacque, Louis C. Resler, John J. Shannon and Warren C. Mc Dowell,

Plaintiffs-Appellants,

against

Robert E. Hampton, Chairman, et al.,

Defendants-Appelles.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK, COUNTY OF NEW YORK, ss.:

, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides That on September 27, 1976, he served 2 copies of 1 copy of Appendix Briefon and

> Hon David G. Trager United States Attorney for the Eastern District of New York U. S. Courthouse 225 Cadman Plaza East, Brooklyn, New York, 11201.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day. . Wesley. Midaniel.

Sworn to before me this 27th day of

September , 19 76.

he VARyanh Notary Public, State of New York
No. 30 0932350
Qualified in Nassau County
Commission Septres Merch SO. 30 7 7